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Denial of Benefits and Article 17 of the Energy Charter Treaty

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Jan Kunstýř

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Preface

I would like to thank my supervisor *Vladimír Balaš* for introducing me to the fascinating area of international law, Investment Treaty Arbitration.

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As a matter of course, all errors in the paper are mine.

Prague, July 2015

Abbreviations

Art.	Article
APEC	Asia-Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
BIT	Bilateral Investment Treaty
CETA	Comprehensive Economic and Trade Agreement
DOB	Denial of Benefits (Clause)
DR-CAFTA	Dominican Republic-Central America-United States Free Trade Agreement
EC	European Commission
ECT	Energy Charter Treaty
FCN	Treaty of Friendship, Commerce and Navigation
FET	Fair and Equitable Treatment Standard
GAI	Guaracachi América Inc
ICC	International Chamber of Commerce (in reference to the Arbitration Institute)
ICJ	International Court of Justice
ICDR	International Centre for Dispute Resolution
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreement
IIDS	International Institute for Sustainable Development
ISDS	Investor-State Dispute Settlement
ITA	Investment Treaty Arbitration
MFN	Most Favoured Nation (Clause)
MIT	Multilateral Investment Treaty
NAFTA	North-American Free Trade Agreement
PCA	Permanent Court of Arbitration
SCC	The Arbitration Institute of the Stockholm Chamber of Commerce
SCC Rules	Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce
TTIP	Transatlantic Trade and Investment Partnership
TPP	Trans-Pacific Partnership
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
USA	United States of America
US	United States
VCLT	Vienna Convention on the Law of Treaties

1. Introduction

The current international investment protection law and the investor-state dispute resolution mechanism in IIAs, investment treaty arbitration (ITA), recently referred to as ISDS, have both come under extensive criticism. The criticism has been widespread ranging from a scholarly perspective through policy-makers' point of view to the opinions of the general public. For example, the investor-state dispute resolution mechanism has been criticised for its one-sidedness,[1] for reducing sovereign's ability to make legitimate public policy choices,[2] for lack of transparency,[3] for absence of any appeals mechanism,[4] etc.

Whether the critics are correct or not, the so called "Denial of Benefits" clause (DOB) gives the respondent state an opportunity to be active. Although it is not a counterclaim against investors, states can use DOB clauses in IIAs to exclude third parties to the IIA from enjoying the benefits of the treaty without assuming reciprocal obligations. In other words, a state may refuse to protect investors or investments if it turns out that they are owned or controlled by a third party state.

States has successfully invoked their right stemming from the DOB clause and denied benefits to investors. In a number of cases, the benefit that had been denied was the possibility of having a dispute resolved by international arbitration, the so called ISDS. DOB clauses are proving out to be effective means in fighting off the practice of treaty-shopping. With one major exception.

The DOB clause in the multilateral ECT[5] has never been successfully invoked. States have tried to use the clause both on jurisdiction and merits in at least ten cases without

[1] States lack the ability to bring counterclaims and are thus tied into the passive role of a respondent, see eg Elizabeth Boomer, 'Rethinking Rights and Responsibilities in Investor-State Dispute Settlement: Some Model International Investment Agreement Provisions' (2014) 1 TDM 1, 31.
[2] eg Corporate Europe Observatory, 'A Transatlantic Corporate Bill of Rights: Investor Privileges in the EU-US Trade Deal Threaten Public Interest and Democracy' (October 2013) 3 <http://corporateeurope.org/sites/default/files/attachments/transatlantic-corporate-bill-of-rights-oct13.pdf> accessed 19 May.
[3] *Boomer* (n 1) 5.
[4] Eg Christian Tietje, Freya Baetens, 'The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic and Investment Partnership' (June 2014) MINBUZA 127.
[5] Energy Charter Treaty (opened for signature 17 December 1994, entered into force 16 April 1998).

success. Tribunals have been consistent in the clause's interpretation that it cannot be invoked retrospectively. Given this interpretation, respondent states would have to monitor foreign investors prior to the dispute or worse prior to the time the investment was made. This begs the question, if it is even possible for Art. 17 of the ECT to be operable? One cannot help but think that the clause is a "dead end".

This paper takes a complex look on the procedural issues of DOB clauses in IIAs with a particular focus on the DOB clause present in the Energy Charter Treaty (ECT) in Art. 17. The clause reads as follows:

Article 17

Non-Application of Part III in Certain Circumstances

> *Each Contracting Party reserves the right to deny the advantages of this Part to:*
>
> *(1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized; or*
>
> *(2) an Investment, if the denying Contracting Party establishes that such Investment is an Investment of an Investor of a third state with or as to which the denying Contracting Party:*
>
> *(a) does not maintain a diplomatic relationship; or*
>
> *(b) adopts or maintains measures that:*
>
> *(i) prohibit transactions with Investors of that state; or*
>
> *(ii) would be violated or circumvented if the benefits of this Part were accorded to Investors of that state or to their Investments.*

The topic of DOB clauses is relevant and will continue to be relevant for a number of reasons. Firstly, Art. 17 of the ECT has been invoked by the Respondent, Russian

Federation, in the set of *Yukos* cases.[6] Secondly, it is now being partly relied upon also at the setting aside proceedings before the district court at The Hague.[7] Thirdly, Slovakia is said to have used the right to deny benefits on several occasions in cases still pending.[8] Fourthly, many modern IIAs contain a DOB clause, which indicates a trend.[9]

1.1. Purpose and Scope

The purpose of this paper is to conduct a complex analysis of procedural aspects of DOB clauses in IIAs. The analysis focuses on the Art. 17 of the ECT as a unique example of a DOB clause. As part of the analysis the author intends to answer the following research questions:

First, what are the distinguishing features of Art. 17 of the ECT that make it function differently from other DOB clauses?

Second, given the arbitral decisions, can the Art. 17 of the ECT be effectively invoked by respondent states?

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[6] *Hulley Enterprises Limited (Cyprus) v The Russian Federation*, UNCITRAL, PCA Case No AA 226, Interim Award on Jurisdiction and Admissibility (30 November 2009); *Veteran Petroleum Limited (Cyprus) v The Russian Federation*, UNCITRAL, PCA Case No AA 228, Interim Award on Jurisdiction and Admissibility (30 November 2009); *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No AA 227, Interim Award on Jurisdiction and Admissibility (30 November 2009).

[7] Ministry of Finance of the Russian Federation, 'Press Release of 6 February 2015' <http://old.minfin.ru/en/news/index.php?id_4=24358> accessed 20 June 2015; for further analysis of the setting aside proceedings see Haley S. Anderson, 'Will Russia Pay the Yukos Settlement?' (IMR institute of modern Russia March 2015) <http://imrussia.org/en/analysis/law/2212-will-russia-pay-the-yukos-settlement> accessed 20 June 2015.

[8] Luke Eric Peterson, 'Eastern Europe round-up: One Polish case ends at ICSID, while another proceeds at SC, Slovakia denies benefits of US BIT to would-be claimant' (28 October 2014) 7 IAReporter; Luke Eric Peterson, 'As investor in litigation-funded case (EuroGas) continues to rattle saber, Slovak Republic announces it will deny benefits under investment treaty' (9 January 2013) IAReporter.

[9] eg (CETA) Comprehensive Economic and Trade Agreement (signed 1 August 2014, if approved, the agreement will come into effect in 2016); (Ukraine-Japan BIT) Agreement between Japan and Ukraine for the Promotion and Protection of Investment (signed 5 February 2015); (Brazil-Mozambique BIT) Cooperation and Investment Facilitation Agreement between Brazil and Mozambique (signed on 30 March 2015).

The topic of DOB clause has already been extensively examined by numerous scholars, most recently by Gastrell and Le Cannu.[10] However, apart from the study by Mistelis and Baltag,[11] there has been no complex study on this topic.

What new can this paper bring? The added value of this paper is threefold. Firstly, unlike the previous studies this paper offers two specific research questions. Secondly, chapter four attempts to use the analysis of the DOB case law to set out a defence strategy for the respondent states. Thirdly, the character of the paper's analysis is strictly delimited by the author's adhering to the following fundamental principles:

Naturally, there is no standard DOB clause. Every DOB clause in an international treaty must be interpreted individually pursuant to the general rule of interpretation in the VCLT.[12] Therefore, the scope of any DOB clause is determined by its *bona fide* interpretation according to its ordinary meaning in its context and in the light of the treaty's object and purpose.

Art. 31 and 32 of the VCLT read as follows:

> ***Article 31 – General rule of interpretation***
> *1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*
> *2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*
> *(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*
> *(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*
> *3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the*

[10] Lindsay Gastrell, Paul-Jean Le Cannu, 'Procedural Requirements of 'Denial-of-Benefits' Clauses in Investment Treaties: A Review of Arbitral Decisions' (2014) 30 ICSID Rev 78, 80.
[11] Mistelis Loukas A and Baltag Crina Mihaela*, 'Denial of Benefits and Article 17 of the Energy Charter Treaty'*(2009) 113 Penn St L Rev 1301.
[12] Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980).

interpretation of the treaty the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 – Supplementary means of interpretation
Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.

Accordingly, one can gauge inconsistency of arbitral decisions only when there are diverging interpretations of one and the same DOB provision of the same treaty.

1.2. Limitations

This paper focuses solely on the procedural issues on DOB clauses and Art. 17 of the ECT. It does not deal with other important aspects of DOB clauses in investment protection treaties such as burden of proof,[13] definition of ownership and control and the interplay between DOB and MFN clauses.[14]

[13] Elvira R. Gadelshina, 'Burden of Proof Under the 'Denial-of-Benefits' Clause of the Energy Charter Treaty: *Actori Incumbit Onus Probandi?*' (2012) 29 Journal of International Arbitration 269.
[14] Jordan Behlman, 'Out on a Rim: *Pacific Rim's* Venture Into CAFTA's Denial of Benefits Clause' (May 2014) 45(2) Inter American Law Review 397, 399.

Another practical limitation of this paper is the fact that the author does not have direct access to the ECT library in Brussels. The ECT library contains the preparatory works of the ECT and could be of value when interpreting the treaty pursuant to the Art. 32 of the VCLT.

However, it is submitted that this limitation is not detrimental to the research. Firstly, there are secondary sources available which reference the preparatory works and the negotiation history of the ECT. Secondly, some parties that did not in the end become signatories, in particular the USA, were heavily involved in the ECT negotiations. Thirdly and finally, in any case the preparatory works and negotiations history of the ECT are highly political, incomplete and not always reliable and are therefore scarcely used in practice.[15]

1.3. Sources and Methodology

The area of ITA encompasses a variety of legal rules including international treaties, procedural rules of arbitral institutions and in some instances even rules of national law. As for the primary sources, this paper relies on the text of IIAs. The secondary sources consist of articles in law journals. As was already mentioned above, only Mistelis and Baltag[16] have conducted a complex study on the topic of DOB clauses. Other articles on DOB clauses either map the recent case law, or deal with more general topics such as the definition of investor, treaty shopping or abuse of process. Some studies are due to their general focus relied upon infrequently, usually as fundamental authority for an introduction of a certain subtopic.

A debate about the role of precedent in ITA has been ongoing for quite some time.[17] Although Art. 38.1.d. of the Statute of the ICJ expressly requires the Court to also take

[15] Alexander J. Bělohlávek, *Ochrana přímých zahraničních investic v energetice* (1st ed C.H. Beck 2011) para 305.
[16] Mistelis (n 11).
[17] See eg Zachary Douglas, 'Can a Doctrine of Precedent Be Justified in Investment Treaty Arbitration?' (2010) 25(1) ICSID Rev—FILJ 104.

into account "*judicial decisions*", there is no such express rule either in the ECT, IIAs or other applicable part of international law as to whether, and if so to what extent, arbitral awards are of any relevance for arbitral tribunals. Obviously, the decisions of other tribunals are not binding. In advocacy or adjudicatory decision-making, they are considered to the extent that they may shed any useful light on the issues being decided upon.

In any case, for the purposes of academic research, arbitral awards and decisions offer a valuable source of information. Therefore, this paper tries to include all the publicly known cases and awards that have touched upon the subject of DOB clause.

When providing background stories and political context of the relevant ITA, this paper relies predominantly on the service of Investment Arbitration Reporter.

The majority of sources are in the English language. As for the sources in the Czech language not older than ten years only three publications seem to be of use. The area of ITA has been examined in general by Balaš and Šturma,[18] but the procedural issues of Art. 17 of the ECT specifically have been discussed only by Bělohlávek.[19]

As for methodology, this paper uses the legal hermeneutic method. Legal hermeneutics is a branch of philosophical hermeneutics and its purpose is „understanding". The method is based, unlike in natural sciences, upon an involvement of the author, who is not a mere natural observer, but whose experience is linked with the act of understanding. Therefore, understanding requires a point of view of the author.[20] The method is appropriate for a comprehensive analysis of DOB clauses and their respective procedural issues. It is used to map and explain different elements of the DOB clauses and their interpretation. The point of view of the author is represented by the fundamental principles this paper relies upon, which are set out in the subchapter 1.1. above.

[18] See Pavel Šturma, *Mezinárodní dohody o ochraně investic a řešení sporů* (2nd ed. Linde Praha 2008); Pavel Šturma, Vladimír Balaš, Mezinárodní ekonomické právo (2nd ed. C.H.Beck 2013).
[19] Alexander J. Bělohlávek, *Ochrana přímých zahraničních investic v energetice* (1st ed C.H. Beck 2011).
[20] Carel Smith, 'The Vicissitudes of the Hermeneutic Paradigm in the Study of Law: Tradition, Forms of Life and Metaphor' (2011) 4 Erasmus Law Review 21, 23.

The hermeneutic method is supplemented by legal inductive method. Induction can be described as drawing inferences from specific observable events to general rules. Specifically, the evidence is collected about observable events and a premise is constructed based on the collected data.[21] The inductive legal method is relied upon when answering the research questions set out above as well as in chapter 4 when attempting to produce a defence strategy guide for the respondent states contemplating the use of their DOB right.

Essentially, this paper has two parts. The first part, ending with chapter 3 is predominantly descriptive. The second part, chapter 4 and 5 are prescriptive. The author's ambition is to keep the two separate. However, one can often find that the last paragraphs of each descriptive section contain the author's own submissions regarding the chapter's or subchapter's focus, as well as descriptive passages in the last two chapters.

1.4. Terminology

When referring to the clause in general, the term DOB clause is used. On the other hand, when reference is made to a specific DOB clause, it is always indicated in which treaty the clause can be found. Although Art. 17 of the ECT contains the language "deny the advantages" rather than the conventional wording "benefits", it is still referred to as a DOB clause.

Some arbitral awards use the term "retroactive", rather than "retrospective" in the same context. It is submitted that the former is more appropriate since the latter is in legal theory associated with statutes.

[21] eg William Thomas Worster, 'The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches' (2014) 45 Georgetown Journal of International Law 447, 448.

Art. 17 (2) deals with situations, which involve third states, with which the denying party does not maintain diplomatic relations or against which it applies Art. 17 (2) has not yet been invoked in practice and it seems unlikely that it will be frequently used in the future. Therefore, whenever a reference is made to Art. 17 without specifying the section, it should be assumed, if the need be in order to maintain the rational of the reference that the reference is made rather to Art. 17 (1), rather than (2).

1.5. Outline of the Study

The paper is divided into five chapters. The first chapter introduces the topic of DOB clauses and the specific case of Art. 17 of the ECT. After first briefly introducing the main issues of the clause, it outlines the purpose and the scope of this paper as well as its limitations. Finally, the first chapter discusses the methodology, sources and the terminology used in this paper.

The second chapter is theoretical and addresses the topic of DOB clauses in general. It starts with an overview of various definitions of the clause and gives examples of different theoretical approaches to the clause. The chapter further outlines the past, the present and the future of DOB clauses. Firstly, it describes the history of inclusion of DOB clauses in international treaties and the main procedural issues that tribunals frequently address. Secondly, it offers a closer examination of the notable arbitral awards, decisions and cases that have so far dealt with DOB clauses present in IIAs excluding the ECT. The cases are examined in the light of the main procedural questions in connection to DOB clauses. Thirdly, the chapter discusses the future of DOB clauses in three major multilateral IIAs that are currently under negotiations.

The third chapter focuses specifically on the DOB clause in the ECT, the Art. 17. In order to answer the research questions set out above, one must start with explaining why Art. 17 is a unique DOB clause. Firstly, the chapter provides an in-depth analysis of the clause and secondly, it examines the ECT arbitral awards and decisions in the light of

the relevant procedural issues. It examines the decisions in the light of the same questions as the overview of non-ECT cases in the previous chapter.

Chapter four has a title “Government’s Guide to DOB”. It aims to show the procedural issues of DOB clauses from the perspective of respondent states that decide to deny benefits. The chapter assumes a form of a manual that would hypothetically guide the dispute stricken respondent state defence.

The fifth chapter summarises the findings of the previous chapters and comments on some of the decisions of arbitral tribunal interpreting Art. 17 of the ECT. The chapter then answers the two research questions and proposes a possible explanation for the current state of affairs surrounding Art. 17 of the ECT. The author proposes a possible solution to the problem of successful invocation of the clause.

2. "Denial of Benefits" Clause

This chapter provides a general overview of DOB clauses in IIAs. It begins with a basic definition of the clause and its general purpose. The various specific purposes of specific DOB clauses are further described in the following subchapters. Furthermore, this chapter also contains a brief historical excursion in order to show that the concept of DOB clauses is a common feature in the field of public international law. Lastly, this chapter closely examines all publicly available non-ECT arbitral awards that deal with DOB clauses.

2.1. Definition and Purpose of DOB Clauses

Generally speaking, the purpose of DOB clauses in IIAs is to exclude third parties from enjoying the benefits of the IIA without assuming reciprocal obligations. In their effect DOB clauses give the host state a possibility to refuse to fulfil its obligations towards an investor or investment of a third party if certain conditions are met. These conditions may differ, but are generally directed to exclude nationals of third states that do not have any reciprocal obligations. Scholars and legal commentators usually define DOB clauses using their purpose. Dolzer and Schreuer saw DOB clauses primarily as a way to counteract treaty shopping or nationality planning. They defined them as follows:

> *Under such a clause the states reserve the right to deny the benefits of the treaty to a company that does not have an economic connection to the state on whose nationality it relies. The economic connection would consist in control by nationals of the state of nationality or in substantial business activities in that state.*[22]

Other scholars and commentators stress safeguarding the status quo of the rights and obligations stemming from a treaty. Mistelis and Baltag see at least two proposes of the clause:

[22] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP 2008) 55.

> *to maintain reciprocity or asymmetry* [sic] *with regard to the benefits arising out of the protection offered by investment treaties, and to exclude from the protection of the treaties the so-called shell companies.*[23]

The UNCTAD's Negotiator's Handbook, a practical tool for negotiators of IIAs, defines the clause similarly in the following terms:

> *The Denial of Benefits provision allows the host State to deny the benefits of the treaty to certain companies owned or controlled by nationals of a third country (nonparty to the treaty) or by nationals of the host State itself. The objective of this provision is to give host States an opportunity to exclude from the scope of the treaty certain companies that are not eligible to enjoy the benefits of the treaty due to economic, political or regulatory considerations.*[24]

Another negotiator's handbook focusing on sustainable development[25] offers a very practical and accessible commentary:

> [the DOB clause] *has the impact of allowing the Parties to deny the application of the Agreement to investors and their investments when they may be established as a company in a "home state," but in reality those companies are shell corporations in turn owned either by residents or companies in the host state or in third states that do not have diplomatic relations with the actual home state where effective control lies.*[26]

When battling treaty shopping, some claim that the significance of a DOB clause is in the fact that the clause is an alternative to invoking the principle of abuse of right:

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[23] *Mistelis* (n 11) 1302.
[24] UNCTAD, *International Investment Agreements Negotiators Handbook: APEC/UNCTAD Modules* (December 2012) 105.
[25] Howard Mann and others, *IISD Model International Agreement on Investment for Sustainable Development, Negotiators' Handbook* (2nd ed 2006) <https://www.iisd.org/sites/default/files/pdf/2005/investment_model_int_handbook.pdf > accessed 25 June 2015.
[26] ibid 10.

> *When available, a denial of benefits provision, rather than the principle of abuse of right, should be a respondent's first choice when facing a claim brought by a company that appears to lack any genuine connection to its purported home State. There are several reasons to prefer a defense based on a denial of benefits provision. First, the abuse of right principle is not grounded in treaty text and is thus susceptible to unpredictable application, as illustrated by several recent decisions applying the principle. Second, expansive application of the abuse of right principle by tribunals would encourage claimants to develop their own theories of abuse of right by States, which in turn would increase State exposure under bilateral investment treaties (BITs) and erode the stability of investor–State arbitration.*[27]

However, perhaps the best way to define the DOB clause's purpose would be to look at its alternatives. What can parties drafting an IIA use instead of a DOB clause to achieve the same effect? DOB clauses usually coincide with a broad definition of "investor". In this sense, in order to prevent nationality planning, parties to a treaty may choose between having the definition of "investor" require an economic bond with the state and inserting into a treaty and a DOB clause.

To give a concrete example, parties to an IIA can choose to include the following language to achieve a similar effect to a DOB clause:

> [*I*]*nvestor of a Contracting Party" means: … a legal person either constituted or otherwise organized under the national legislation of a Contracting Party, and is engaged in substantive business operations in the territory of that Contracting Party*.[28]

Indeed, including more stringent requirements in the definition of "investor" will have an effect similar to a DOB clause. In this respect, one must not forget the reason why

[27] Mark Feldman, 'Setting Limits on Corporate Nationality Planning in Investment Treaty Arbitration' (2012) 27(2) ICSID Rev—FILJ 281, 283.
[28] Wording from Agreement between the Government of the United Mexican States and the Government of the Republic of Belarus on the Promotion and Reciprocal Protection of Investments, signed 9 April 2008, entered into force 27 August 2009; see UNCTAD, *International Investment Agreements Negotiators Handbook: APEC/UNCTAD Modules* (December 2012) 26.

states enter into IIAs. Capital importing states may want to attract as many foreign investors to invest in their territories as possible. Capital exporting states may want to protect as many of their nationals as possible. Moreover, increasing number of states are both capital exporting and importing. Therefore, excluding a certain type investors flatly without exceptions may prove undesirable from the parties' perspective.

In fact, doing so would result in depriving the parties of their right to choose whether or not they deny benefits to the investor of the other party. Having choice is a characteristic feature of DOB clauses. Commentaries to the US Model BITs support this view. The commentaries state that the purpose of the DOB clause is to "*allow either party to determine whether to extend treaty benefits when involvement by nationals of either party is relatively minor*."[29] Furthermore, all known DOB clauses have been interpreted to mean that the state must act to exercise its right to deny benefits. This fact is discussed for the case of Art.17 of the ECT in chapter 3 below.

Finally, it is important to stress that similarly to other types of clauses in IIAs there is no standard DOB clause. Naturally, there are multiple versions of the DOB clause. And exactly in the same way like any other clause in IIAs, every DOB clause must be interpreted using the rules of interpretation laid down in the Vienna Convention of the Law of Treaties (VCLT).[30]

Various DOB clauses are present in a number of BITs, in investment chapters of MITs such as the ECT, NAFTA[31] the DR-CAFTA[32] and even in the recently negotiated CETA.[33] However, as Gastrell and Le Cannu rightly point out, not all investment treaties contain a DOB clause and the ultimate decision whether to include it or not remain with the parties to the treaty.[34] Some states may decide not to include such a

[29] P.B. Gann, 'The US Bilateral Investment Treaty Program' (1985) 21 STAN. J. INT'L L. 373, 379-80.
[30] VCLT (n 12) art 31; the importance of sound treaty interpretation is stressed, inter alia, in almost every work of Kaj Hobér: See Kaj Hobér, Selected Writings on Investment Treaty arbitration (Studentlitteratur, 8 December 2013).
[31] North American Free Trade Agreement between the United States, Canada and Mexico (signed 17 December 1992, entered into force 1 January 1994).
[32] Dominican Republic-Central America-United States Free Trade Agreement (signed 5 August 2004, entered into
force 1 March 2006).
[33] Comprehensive Economic and Trade Agreement (negotiations concluded 1 August 2014, if approved, the agreement will come into effect in 2016).
[34] *Gastrell* (n 10) 80.

clause, France Model BIT 2006 and Germany Model BIT 2008 may serve as examples.[35]

In this manner, the Tribunal in *Tokios Tokelés v Ukraine* stated that DOB clauses must not be read into IIAs thus if they are not included in those IIAs:

> *We regard the absence of* [a DOB] *provision as a deliberate choice of the Contracting Parties. In our view, it is not for tribunals to impose limits on the scope of BITs not found in the text, much less limits nowhere evident from the negotiating history*.[36]

In conclusion, the general purpose of DOB clauses is to maintain reciprocity. In IIAs the clause complements the definition of investor and provides an additional safeguard. To put it bluntly, no benefits for your investor if you do not assume the same obligations to provide benefits to my investors.

2.2. History of DOB Clauses in Public International Law

In order to further shed light on the purpose behind including a DOB clause in treaties, one must look at its history. This was done by Mistelis and Baltag[37] and this subchapter relies predominantly on their findings.

First forms of DOB clauses can be found for example in the US- Siam FCN:

> […] *neither High Contracting Party shall be required by anything in this paragraph to grant any application for any such right or privilege* [exploration and exploitation of mineral resources] *if at any time such*

[35] Italaw, 'Model BITs' <http://www.italaw.com/investment-treaties> accessed 20 June 2015.
[36] *Tokios Tokelés v Ukraine*, ICSID Case No ARB/02/18, Decision on Jurisdiction (29 April 2004) para 36. For more on the scope of investor see Anthony C. Sinclair, 'The Substance of Nationality Requirements in Investment Treaty Arbitration' (2005) 20 ICSID Review – FILJ 357, 378–387.
[37] *Mistelis* (n 11) 1302-1305.

> *application is presented the grating of all similar applications shall have been suspended or discontinued*.[38]

However, the modern concept of the DOB clause has its origins in the US FCNs after 1945. The US-China FCN from 1946 contains the following language:

> […] *each High Contracting Party reserves the right to deny any of the rights and privileges accorded by this Treaty to any corporation or association created or organized under the laws and regulations of the other High Contracting Party which is directly or indirectly owned or controlled, through majority stock ownership or otherwise, by nationals, corporations or associations of any third country or countries*.[39]

There are some visible differences in the language between historical DOB clauses and the ones present in the IIAs. The underlying concept, however, has not changed. The USA have always been including DOB clauses in their BITs.

> *Each Party reserves the right to deny to a company of the other Party the benefits of this Treaty if nationals of a third country own or control the company and*
>
> *a) the denying Party does not maintain normal economic relations with the third country; or*
>
> *b) the company has no substantial business activities in the territory of the Party under whose laws it is constituted or organized.*[40]

A commentary to BITs based on the 1994 US Model BIT sheds light on some specific reasons for including a DOB clause: "a non-Party country with which the denying Party

[38] The Treaty of Friendship, Commerce and Navigation, with Final Protocol between the United States of America and Siam (signed on 13 November 1937) art 1(8).
[39] Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of China, signed on 4 November 1946 and entered into force on 30 November 1948) art XXVI(5).
[40] 1994 US Model BIT, see *Mistelis* (n 11) 1305.

does not have normal economic relations" includes a country upon which the USA is applying economic sanctions, such as for example Cuba.[41]

2.3. Procedural Issues of DOB Clauses

Generally speaking, what all DOB clauses have in common is their structure as far as that they all have a procedural part and a substantive part. Procedural parts of DOB clauses indicate the manner in which the DOB right is activated and substantive parts lists the grounds that must be satisfied for the benefits to be denied. As set out in chapter 1 above, this paper limits its focus to the procedural issues of DOB clauses, i.e. the issues in stemming from the procedural part of DOB clauses.

2.3.1. Jurisdiction or Merits?

Tribunals often decide on the question whether the DOB clause in question creates a jurisdictional hurdle or whether the clause is an issue of merits. The former situation would mean that if the DOB clause were effectively invoked, the tribunal would not have power to finally decide the dispute. The latter situation would mean that the power of the tribunal to decide would not be affected. The clause would become a defence on the merits in the sense that if the DOB clause were effectively invoked, the merits of the claims would not have to be gone into. Indeed, some tribunals and authors see this as a matter of "admissibility."[42] It is submitted that this issue is a mere question of terminology and that, in fact, the term "admissibility" is used for the latter situation "merits" in case the tribunal decides to treat the invocation of the DOB clause as a preliminary issue.

[41] *Mistelis* (n 11) 1305.
[42] *Generation Ukraine, Inc v Ukraine*, ICSID Case No ARB/00/9, Award (16 September 2003) para 15.7; Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press 2009) 469.

Although not all jurisdictions recognise the concept of admissibility, the distinction between jurisdiction, admissibility and merits is not unimportant.[43] It is a doctrinal question going beyond the scope of this paper. However, to briefly explain the terms: Jurisdiction, in this sense, means the tribunal's power to finally decide the dispute. By lack of admissibility, in ITA it is generally understood that the case cannot be heard by any judicial body.[44]

Of course, it is needless to repeat that every DOB clause must be interpreted pursuant to the rule of interpretation. However, one can observe that tribunals, in answering the question "jurisdiction or merits", looked at the range of the benefits that are denied under the clause. If the benefits included the dispute resolution mechanism clause, tribunals tend to read the clause as a jurisdictional defence.

An important topic that arises in connection with the question of jurisdiction or merits character of DOB clauses is burden and standard of proof. This topic is not the main area of focus of this paper, however, it deserves a brief explanation in subchapter 2.3.4 below.

2.3.2. Exercise of the Denial of Benefits Right and its Form

The question whether a DOB clause works automatically or whether the state must actively exercise its right to deny benefits is one of interpretation. For DOB clauses in IIAs, the wording "reserves the right to deny" or "may deny" is typical and frequent.

Tribunals have been consistent in their interpretation of these terms as indicating that the right to deny benefits is not automatic and must be invoked. The possible example

[43] See eg Jan Paulsson, 'Jurisdiction and Admissibility' in Gerald Aksen and others (eds), *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in honour of Robert Briner* (ICC Publishings 2005) 601; Andrea M. Steingruber, 'Some remarks on Veijo Heiskanen's Note: Ménage à trios? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration' (2014) 29 ICSID Rev—FILJ 675.

[44] John G. Merrills, Gerald Fitzmaurice (eds), *Judge Sir Gerald Fitzmaurice and the Discipline of International Law: Opinions on the International Court of Justice, 1961-1973* (Martinus Nijhoff Publishers 1998) 36.

of "an automatic" DOB clause can be found in the ASEAN Framework Agreement on Services,[45] which includes the following wording: "The benefits of this Framework Agreement shall be denied".

The DOB clauses do not specify the form of their invocation. The question of the appropriate form for the act of denial has also been discussed by tribunals. Some IIAs include a requirement of a prior notice or consultations.[46]

2.3.3. Retrospective or Prospective Effect?

Having concluded that a state must actively exercise the right, the question of the appropriate timing arises. Does the exercise of the DOB clause have only prospective effects or could it have also retrospective effects? In other words, does the state have to exercise its right to deny benefits to the investor before the investment is made? Or after the dispute is filed? Once again, it is a matter of interpretation of each individual clause. At this point, suffice it to say that there seems to be a divisive line between the ECT decisions and the rest.

The question of timing as well as other procedural questions regarding DOB clauses is discussed in connection to concrete examples in subchapters 2.4. and 3.2. below.

2.3.4. Standard and Burden of Proof on Jurisdiction

In ITA it is universally accepted that for the standard of proof on jurisdiction, tribunals apply two standards. In the context of factual issues which are common to both jurisdictional issues and the merits, *prima facie* standard is usually applied. However,

[45] ASEAN Framework Agreement on Services (signed 28 January 1992, entered into force 15 December 1995).
[46] eg DR-CAFTA (n 32).

where a factual issue is relevant only to jurisdiction and not to the merits, a higher standard requiring the party to make it more likely than not that the fact the party seeks to prove is true.

This stems from the often referred to reasoning of the *Phoenix* award on jurisdiction. The Tribunal in that case stated:

> [i]*t ... must look into the role* [the] *facts play either at the jurisdictional level or at the merits level ... If the alleged facts are facts that, if proven, would constitute a violation of the relevant BIT, they have indeed to be accepted as such at the jurisdictional stage, until their existence is ascertained or not at the merits level. On the contrary, if jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage*.[47]

As for the burden of proof, the general principle of law is that a party claiming an assertion must prove that assertion.

2.4. Notable Non-ECT Cases

This subchapter provides an overview of the investment treaty awards and decisions addressing the issue of a DOB clause. Tribunals' treatment of DOB clauses is examined against the specific provisions in their treaty.

The importance of this analysis is twofold. First, it highlights the variety of wording of DOB clauses in IIA's other than the ECT. Second, some tribunals engage in direct comparison of the respective DOB clauses with Art.17 of the ECT. Whether this is a correct approach is discussed in chapter 5.

[47] *Phoenix Action, Ltd. v The Czech Republic*, ICSID Case No. ARB/06/5 (6 April 2007) paras 60-61.

The depth of analysis of each award or decision is equal to their significance for the research purposes of this paper. Cases are examined solely on the basis of their treatment of the DOB clause. In particular, the following three areas are investigated:

First, can the clause constitute a jurisdictional defence?

Second, does the right have to be exercised, and if yes, how?

And third, are the effects of the denial prospective or retrospective?

Not every question is addressed in each case, because not all tribunals faced all the questions. It depends on the specific factual background of each case.

2.4.1. CCL v Kazakhstan

In this case[48] a US based investor sought a claim against Kazakhstan at the SCC pursuant the SCC Rules on the basis of, *inter alia*, US-Kazakhstan BIT. The dispute arose from a terminated concession agreement. The relevant provision in the BIT reads as follows:

> […] 2. *Each Party reserves the right to deny to any company the advantages of this Treaty if nationals of any third country control such company and, in the case of a company of the other Party, that company has no substantial business activities in the territory of the other Party or is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations.* […][49]

The Tribunal, given the interpretation of the DOB clause in the context of the BIT, decided that the DOB's requirements are amongst the conditions for the tribunal's

[48] *CCL v. Republic of Kazakhstan*, SCC Case 122/2001, Jurisdictional Award (1 January 2003).
[49] The Treaty Between the United States of America And The Republic of Kazakhstan Concerning the Reciprocal Encouragement and Protection of Investment (signed on May 19 1992, entered into force January 12 1994) art 1(2).

jurisdiction. Kazakhstan argued that Claimant was an "empty shell" and that was not in fact owned or controlled by a US citizen. Therefore the Claimant must show evidence and information about structure and nationality of its shareholders. The Claimant refused to comply arguing that they wished the shareholders to remain anonymous.

The tribunal first stated that in case when reasonable doubt had been raised as to the actual ownership and control over the company seeking protection, the burden of proof is on the company seeking protection. Secondly, it held that although it was satisfied that the Claimant had been created under the laws of the State of New York, the Claimant failed to provide any information let alone evidence about its control. Finally, the tribunal agreed with Kazakhstan's argument and found that it lacked jurisdiction over the claims based on the BIT.[50]

2.4.2. EMELEC v Ecuador

In this case[51] an ultimate shareholder of EMELEC, a company incorporated in the USA, claimed for an alleged expropriation and denial of justice in relation to an electricity concession it ran in Guayaquil, Ecuador. The DOB clause in US-Ecuador BIT[52] is identical to the US-Kazakhstan one in the case above.

The tribunal did not decide directly on the matter of Ecuador's DOB defence, however, it stated *in dicta* that the exercise of the DOB clause was timely, upon raising objections to jurisdiction,[53] affording it a retrospective effect. The tribunal also stated that the determination of the substantive requirements of the DOB cause can only be dealt with on merits.

[50] *CCL* (n 48) 152.
[51] *Empresa Eléctrica del Ecuador, Inc. v Republic of Ecuador*, ICSID Case No. ARB/05/9, Award (2 June 2009).
[52] Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment (signed 27 August 1993, entered into force 11 May 1997) art 1(2).
[53] *EMELEC* (n 51) para 71.

It is worth noting that the tribunal interpreted, although only *in dicta*, the identically worded clause differently from the tribunal in *CCL v. Republic of Kazakhstan*. From the little the tribunal stated one can conclude that it regarded the DOB clause to be an issue of admissibility on not a jurisdiction defence.

2.4.3. Generation Ukraine, Inc. v Ukraine

In this case[54] a US based construction company established a local company in Ukraine in order to obtain a construction permits for an office-building project. The permits were subsequently revoked. The DOB clause in US-Ukraine BIT,[55] is identical to the DOB clauses in the US BITs mentioned above. Again, the benefits to be denied encompass the whole treaty, i.e. the dispute resolution mechanism clause as well.

Similarly to the case above, the tribunal did not rule specifically on the issue, however, it stated:

> "*This is not, as the Respondent appears to have assumed, a jurisdictional hurdle for the Claimant to overcome in the presentation of its case; instead it is a potential filter on the admissibility of claims which can be invoked by the respondent State*."[56]

The tribunal in this case saw the DOB clause clearly as an admissibility issue. This interpretation is in line with the *EMELEC* tribunal. There is a clear dismissal, although *in dicta*, of the opinion that the DOB clause is a jurisdictional requirement.

[54] *Generation Ukraine* (n 42).
[55] Treaty between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment (signed 4 March 1994, entered into force 16 November 1996).
[56] *Generation Ukraine* (n 42) para 15.7.

2.4.4. Pac Rim Cayman LLC v El Salvador

In this case,[57] Pacific Rim Mining Corporation, a Canadian company, sought to mine gold and silver in El Salvador. After failing to obtain necessary permits, it claimed, through its US subsidiary, that El Salvador's actions breached the country's obligations under DR-CAFTA.[58] The relevant part of the DOB clause in DR-CAFTA was Art. 10.12. section 2. The whole Art. 10.12 reads as follows:

> ***Article 10.12: Denial of Benefits***
>
> *1. A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such other Party and to investments of that investor if persons of a non-Party own or control the enterprise and the denying Party:*
>
> *(a) does not maintain diplomatic relations with the non-Party; or*
>
> *(b) adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.*
>
> *2. Subject to Articles 18.3 (Notification and Provision of Information) and 20.4*
>
> *(Consultations), a Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of any Party, other than the denying Party, and persons of a non-Party, or of the denying Party, own or control the enterprise.*

[57] *Pac Rim Cayman LLC v Republic of El Salvador*, ICSID Case No ARB/09/12, Decision on the Respondent's Jurisdictional Objections (2 August 2010).
[58] CAFTA (n 32).

It is to be noted that chapter 10 of DR-CAFTA, i.e. the treaty the benefits of which are to be denied, includes the dispute mechanism provision (Art. 10.17, 10.18).[59] Furthermore, under CAFTA and the Respondent's right to deny benefits is subject to the notification and consultation.[60]

The tribunal took the view that the invocation of the right to deny benefits is linked to the jurisdiction and, consequently, must be raised within the time limits prescribed to such exceptions.[61] Specifically, the Tribunal held that the DOB clause must be invoked no later than the Counter-Memorial, in accordance with the ICSID Arbitration Rule 41.[62] Thus, allowing for its retrospective effect and denying jurisdiction to the US Claimant based on the DOB clause in DR-CAFTA.[63]

The reasoning of the tribunal was detailed with references to the rules in VCLT and with distinguishing previous decisions concerning the DOB clause.

2.4.5. Ulysseas v. Ecuador

In this case[64] a US company, Ulysseas, claimed breaches of the US-Ecuador BIT concerning its investments in the Ecuadorian power-generation sector. For the underlying DOB clause, see the citation above of the US- Kazakhstan BIT in charter 2.4.1., which is identical to the US-Ecuador BIT.

[59] CAFTA (n 32) art 10.17, 10.18.
[60] ibid art 18.3(1) *To the maximum extent possible, each Party shall notify any other Party with an interest in the matter of any proposed or actual measure that the Party considers might materially affect the operation of this Agreement or otherwise substantially affect that other Party's interests under this Agreement*, art 20.4(1*) Any Party may request in writing consultations with any other Party regarding any actual or proposed measure or any other matter that it considers might affect the operation of this Agreement*.
[61] *Pac Rim* (n 57) para 4.92.
[62] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966).
[63] *Pac Rim* (n 57) paras 4.83-4.91.
[64] *Ulysseas Inc. v. Republic of Ecuador*, PCA case, UNCITRAL, Interim Award, (28 September 2010).

Ecuador invoked Art. I(2) of the BIT as an objection to jurisdiction and aim to deny benefits of the BIT to Ulysseas since the company was allegedly owned by a Brazilian national and had no substantial business activities in the USA.[65]

The tribunal firstly established that the DOB clause in the BIT is able to bar jurisdiction and secondly that it can be exercised retrospectively. Specifically, it stated that must be invoked no later than the Statement of Defense, in accordance with the UNCITRAL Arbitration Rules.[66] However, it subsequently found that the substantive requirements are not fulfilled, as the Claimant was in fact controlled by a US citizen, and dismissed the DOB objection.[67]

EMELEC and *Ulysseas* are both disputes based on the US-Ecuador BIT. The tribunals reached the same conclusions that the DOB clause in the treaty can become a jurisdictional defence.

2.4.6. Rurelec plc v Bolivia

On 31 January 2014, an arbitral tribunal constituted under the UNCITRAL Rules, rendered an award[68] declining jurisdiction over the claims brought by one of two Claimants against Bolivia under the US-Bolivia[69] and UK-Bolivia[70] BITs. The tribunal partially based its decision on Bolivia's invocation of the DOB clause in the former BIT. The latter BIT does not contain a DOB clause.

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[65] *Ulysseas* (n 64) paras 75, 172, 114.
[66] ibid paras 172–4.
[67] ibid para 190.
[68] *Guaracachi America, Inc. and Rurelec plc v Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Award (31 January 2014).
[69] Agreement between the Government of the United States of America and the Government of the Republic of Bolivia Concerning the Encouragement and Reciprocal Protection of Investment (signed 17 April 1998, entered into force 6 June 2001, terminated 10 June 2012), Bolivia has terminated this BIT. The US Department of State indicates on its website that, as of the date of termination, the treaty ceased to have effect, except that it will continue to apply for another 10 years to covered investments existing at the time of termination.' See <http://www.state.gov/e/eb/ifd/bit/117402.htm#7> accessed 20 June 2015.
[70] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Bolivia for the Promotion and Protections of Investments (signed 24 May 1988, entered into force 16 February 1990).

The Claimants were Guaracachi América Inc. (GAI), a company incorporated in the United States and its parent company Rurelec Plc, constituted under the laws of England and Wales. Following Bolivia's nationalising of a local electric company the Claimants, being the company's shareholders, alleged violation of multiple provisions of the US-Bolivia and UK-Bolivia BIT. Bolivia challenged the jurisdiction of the tribunal over the claims by invoking the DOB clause in Art. XII of the US-Bolivia BIT.

Art. XII reads as follows:

> ***ARTICLE XII***
>
> *Each Party reserves the right to deny to a company of the other Party the benefits of this Treaty if nationals of a third country own or control the company and:*
>
> *(a) the denying Party does not maintain normal economic relations with the third country; or*
>
> *(b) the company has no substantial business activities in the territory of the Party under whose laws it is constituted or organized.*
>
> *Firstly, the tribunal found that the requirements for the invocation of Article XII(b) had been satisfied. Then it stated that it considers the DOB clause to be a jurisdictional defence. Thirdly, the tribunal went on to determine whether Bolivia had invoked its right to deny the benefits of the BIT (including the benefit of having a dispute decided by an arbitral tribunal) in a timely manner. Put differently, whether the DOB clause in Article XII of the BIT can be applied retrospectively.*

The tribunal stated that "*the very purpose of the DOB clause is to give the Respondent the possibility of withdrawing the benefits under the BIT to investors who invoke those*

benefits", and as such the denial is activated when the benefits are being claimed. Accordingly, the tribunal found it lacked jurisdiction over the GAI's claims. [71]

The treatment of the DOB clause in the Rurelec case is in sharp contrast to the treatment of the DOB clause in Art. 17 of the ECT interpreted in decisions based on the decision in *Plama* v Bulgaria.[72] In those decisions, the DOB clause was applied as a matter of merits and only with a prospective effect. Further analysis of *Plama* can be found below in subchapter 3.2.2.

Consequently, some commentators[73] suggested that there is a diverging case law when it comes to the scope and effect of the clauses. These comments are another contribution to an ongoing debate about which is the correct approach to application of DOB clauses.[74]

2.4.7. Adams & Co. Inc. v Slovakia

Adams & Co. Inc., a US incorporated company, issued a notice of dispute regarding a claim under the US-Slovakia BIT,[75] alleging that the Slovak Republic breached the BIT in connection with a domestic legal proceedings lasting for more than 15 years, which is considered by Adams to constitute a denial of justice.

> *2. Each Party reserves the right to deny to any company the advantages of this Treaty if nationals of any third country control such company and, in the case of a company of the other Party, that company has no substantial business activities in the territory of the*

[71] *Rurelec* (n 68) para 376.
[72] *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 February 2005).
[73] Carmen Núñez-Lagos and Olmedo Javier García, 'The invocation of "denial of benefits clauses: when and how?' (17 February 2014) Kluwer Arbitration Blog.
[74] For the debate see *Behlman* (n 14).
[75] Treaty with the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment (signed 22 October 1991, entered into force 19 December 1992).

other Party or is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations.[76]

On 22 October 2014, the Slovak Republic exercised its right under the US-Slovakia BIT and denied benefits of the BIT to Adams. Slovakia did so by issuing an announcement on the official webpage of the Ministry of Finance of the Slovak Republic.[77] In the announcement Slovakia stressed that the purpose of the BIT is to promote greater economic cooperation between the United States and the Slovak Republic with respect to investment by nationals and companies of one country in the territory of the other country.[78]

Slovakia stated that to their knowledge Adams is not engaged in substantial business activities in the United States and is controlled by a national of a third country. Accordingly, Slovakia informed Adams by means of a formal letter thereby exercising the State's right to deny the benefits of the Treaty to Adams.[79] Based on the available sources, Adams has not filed any claim in this matter under the BIT.[80]

This case offers an example of how can states exercise their right to deny benefits.

2.5. Future DOB Clauses

This subchapter addresses the possible future versions of DOB clauses. It demonstrates the future significance of DOB clauses on the three currently negotiated multilateral treaties that include investment protection chapters. It may not be clear from the

[76] US-Slovakia BIT (n 75) art 2.
[77] Ministry of Finance of the Slovak Republic, 'Announcement about denial of benefits to Adams & Co. Inc. by the Slovak Republic' (23 October 2014) <http://www.finance.gov.sk/En/Default.aspx?CatID=10&id=78> accessed 19 June 2015.
[78] US-Slovakia BIT (n 75) preamble.
[79] *Ministry of Finance of the Slovak Republic* (n 76).
[80] For further details of this case see Peter Plachy, 'Adams v. Slovakia – Investment Arbitration and Denial of Justice' (13 Novermber 2014) Slovak Arbitration Blog < adams-v-slovakia-investment-arbitration-and-denial-of-justice> accessed 16 June 2015.

subchapters below, but the character of the three IIAs, in fact, resembles the ECT, rather than a BIT. The first IIA has already been negotiated and is publicly available.

2.5.1. CETA

CETA[81] is a free trade agreement between Canada and the European Union. The agreement is currently still at a legal scrubbing level. It has to be approved by the Council of the European Union and the European Parliament in order to enter into force. Most probably, all EU member states will have to give their approval. If approved, the agreement will begin to come into effect in 2016.[82] Recently, CETA has met with opposition from some EU countries and its future remains uncertain.[83]

Interestingly, CETA has both a DOB clause and a narrow definition of "investor" requiring an economic bond.[84] The dispute resolution mechanism clause can be found in the same chapter under Art. X.17.

> ***Article X.15: Denial of Benefits***
>
> *A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of that Party and to investments of that investor if:*
>
> *investors of a non-Party own or control the enterprise;*
> *and the denying Party adopts or maintains measures with respect to the non-Party that:*
> *are related to maintenance of international peace and security; and*

[81] CETA (n 32).
[82] See European Commission, EU-Canada Comprehensive Economic and Trade Agreement <http://ec.europa.eu/trade/policy/in-focus/ceta/> accessed 21 June 2015.
[83] Euractiv, *MEPs unimpressed with Commission's ISDS proposal* (7 May 2015) <http://www.euractiv.com/sections/trade-society/meps-unimpressed-commissions-isds-proposal-314389>.
[84] It has been unofficially confirmed that the EC proposed going the way of a narrow definition of "investor" while Canada insisted on having a DOB clause.

prohibit transactions with the enterprise or would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments. [emphasis added]

Article X.3: Definitions

[…]For the purposes of this definition an 'enterprise of a Party' is:

an enterprise that is constituted or organised under the laws of that Party and has substantial business activities in the territory of that Party; or

an enterprise that is constituted or organised under the laws of that Party and is directly or indirectly owned or controlled by a natural person of that Party or by an enterprise mentioned under a). [emphasis added][85]

From the two provisions above one can make a number of observations. Firstly, the DOB clause in CETA does not fight "treaty shopping". Its substantive part does not provide for a close economic link. This seems to have been left solely on the narrow definition of "enterprise". Secondly, the DOB clause refers to the scope of the benefits being denied as "benefits of this Chapter", therefore, one can argue that the DOB clause could be capable of establishing a jurisdictional obstacle if invoked.

2.5.2. TTIP

The TTIP is a proposed free trade agreement between the EU and the USA. The American government considers the TTIP a companion agreement to the TPP. The EC

[85] CETA (n 32) art X.15, X.3.

launched a public consultation on a limited set of clauses and in January 2015 published parts of an overview.[86]

The fate of the TTIP and the final shape of its investment protection chapter are currently uncertain. The negotiations are still pending and it would be premature to draw any judgements on when or if the treaty is concluded.

However, supposing that the treaty is successfully negotiated, it would very likely include a kind of DOB clause. As the negotiations of CETA have shown, one party to the negotiations, the EC, seems to be open to inclusion of a DOB clause. The other party to the negotiations, the USA, has a long history of including DOB clauses. Therefore, it is submitted that it can be reasonably assumed that not only the TTIP will contain a DOB clause, but also that the DOB clause will resemble the latest version of the DOB in the 2012 US Model BIT:

> ***Article 17: Denial of Benefits***
>
> *1. A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if persons of a non-Party own or control the enterprise and the denying Party:*
>
> *(a) does not maintain diplomatic relations with the non-Party; or*
>
> *(b) adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Treaty were accorded to the enterprise or to its investments.*
>
> *2. A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial*

[86] European Commission, Question and Answers on the results of the public consultation (12 January 2015) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1233> accessed 21 June 2015.

business activities in the territory of the other Party and persons of a non-Party, or of the denying Party, own or control the enterprise.[87]

Recalling the wording of the DOB clause in CETA, including section 2., i.e. the part that is aimed at "treaty shopping", might become superfluous in case there would be a narrow definition of "investor".

2.5.3. TPP

The TPP is a proposed regulatory and investment treaty. So far, twelve countries in the Asia Pacific region have participated in negotiations on the TPP: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam. Similarly to CETA and TTIP, this multilateral agreement has a larger scope than investment protection. As the negotiations are still pending it would be premature to estimate when the treaty will be concluded.

A proposed draft of the investment chapter leaked was leaked in March 2014.[88] Naturally, due to its preliminary form, this draft should be taken with a grain of salt, however, at minimum, it can serve as an evidence of will to include a DOB clause. The TPP draft DOB clause reads as follows:

Article II.14: Denial of Benefits

1. A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such other Party and to investments of that investor if the enterprise:

(a) is owned or controlled either by persons of a non-Party or of the denying Party; and

[87] US Department of State, 2012 US Model BIT, <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> accessed 23 June 2015. Notably, the DOB clause in 2012 US Model BIT is identical to that in the 2004 US Model BIT.
[88] Wikileaks, TPP Investment Chapter <https://www.wikileaks.org/tpp-investment/WikiLeaks-TPP-Investment-Chapter.pdf> accessed 13 June 2015.

(b) has no substantial business activities in the territory of any Party other than the denying Party.

2. A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such other Party and to investments of that investor if persons of a non-Party own or control the enterprise and the denying Party adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.

The DOB clause in the TTP draft is very similar to the one in the 2012 US Model BIT.[89] The substance of the provision is identical, since the differences are rather formalistic. The first difference from Art.17 of the US Model BIT, which is immediately visible, is the fact that section 1. and section 2. have switched places and formal layouts. It is submitted that this fact will not have any practical effect other than highlighting the more frequently used grounds of DOB clauses.

The second difference is that in section 2. of the TPP draft, the substantive ground "not maintaining diplomatic relations with the non-party" has been dropped.

In conclusion, unlike in CETA, the DOB in the TTP draft has a larger scope. Its substantive part includes the requirement of a close economic link and therefore serves the purpose of fighting treaty-shopping, but unlike CETA, it gives the denying state the right to choose whether or not to invoke the right.

[89] *2012 US Model BIT* (n 87) art 17.

3. Article 17 of the ECT

This chapter focuses on the special case of a DOB clause in the ECT. ECT is a multilateral treaty dealing specifically with intergovernmental cooperation in the energy sector.[90] Fifty-two European and Asian countries have signed or acceded to the treaty.[91]

When interpreting the ECT, next to its provisions, one may find it useful to look at its objectives set out in its introductory remarks:

> *The fundamental aim of the Energy Charter Treaty is to strengthen the rule of law on energy issues, by creating a level playing field of rules to be observed by all participating governments, thus minimising the risks associated with energy-related investments and trade.*

As well as the treaty's purpose expressed in Art. 2:

> ***Article 2***
> ***Purpose of the treaty***
>
> *This Treaty establishes a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter.*

3.1. Analysis of Art. 17 of the ECT

This subchapter does not aim to make its own interpretation of the provision, but rather, it identifies individual elements of the provision and highlights some of their contentious parts. For the text of Art. 17 of the ECT see page 10 of this paper.

[90] For a legal and economic analysis of the ECT, its historical roots and negotiation's history see Thomas W. Wälde (ed), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (Kluwer 1996).
[91] Recently, in April 2015, Italy has given formal notice to withdraw from the ECT. See Energy Charter Secretariat <http://www.encharter.org> accessed 13 June 2015.

Art. 17 of the ECT can be found in its Part III, entitled "Investment Promotion and Protection". The Art. itself is entitled "Non-application of Part III in Certain Circumstances" which suggest that the Art. entails certain circumstances under which the provisions of Part III will not apply. The legal nature of Art. 17 is that of an exception.[92]

The expression "*Each Contracting Party reserves the right to deny*" suggests that the provision does not apply automatically, but that that right must be exercised to be effective. Unless that right is exercised, the investor or investment will continue to enjoy the substantive protections in Part III of the ECT. Therefore, having reserved the right, the state may or may not exercise its right.[93]

It is obvious from the structure of Art. 17 (1) of the provision that the option to deny the benefits to certain entities exists only if those entities meet the two cumulative requirements, as the conjunction "and" is used. On the other hand, section (2) and its individual options in letters (a) and (b) are constructed alternatively.

Furthermore, the scope of Art. 17 covers only the Part III of the ECT and not to the dispute settlement mechanism provision in Art. 26, which can be found in Part V. Therefore a state cannot deny the benefit of having the dispute resolved in accordance with Art. 26. It seems that Art. 17 does not prevent a tribunal from exercising it jurisdiction.

Apparently, there is nothing in the negotiating history of the ECT that would suggest that the parties to the ECT intended anything other than what the analysis above lays out.[94]

[92] *Petrobart Limited v The Kyrgyz Republic,* SCC Case No. 126/2003, Supplementary Opinion of Adnan Amkhan (30 October 2004) para 20.
[93] Mena Chambers, 'Series of Notes on the Energy Charter Treaty: Denial of Benefits under the Energy Charter Treaty' (12 March 2014) 1.
[94] ibid para 10.

3.2. ECT Case Law Overview

This subchapter analyses the known arbitral awards and decisions addressing the procedural issues of Art. 17 of the ECT. The cases and their main findings are introduced chronologically from the eldest to the latest.

The depth of analysis of each award or decision is equal to their significance for the research purposes of this paper. As already stated above, a detailed analysis of the facts of each case would be necessary in order to fully understand tribunals' reasoning as the distinct factual background of each case may be an important factor of the tribunals' particular decision. However, it is submitted that if the tribunals rule on the issue of Art. 17 their statement of principle remains a valuable authority.

In the same manner as the non-ECT decisions the following cases are examined solely on the basis of their treatment of the DOB clause. Similarly, the following three areas are investigated:

First, can the clause constitute a jurisdictional defence?

Second, does the right have to be exercised, and if yes, how and when?

And third, are the effects of the denial prospective or retrospective?

3.2.1. Petrobart Limited v Kyrgyzstan

In the *Petrobart* case the Claimant, Petrobart Ltd incorporated in Gibraltar, claimed an unpaid gas delivery from a Kyrgyz state owned enterprise. The tribunal did not rule on the issue whether the DOB clause could be a jurisdictional defence.[95] It found that the conditions for application of Art. 17(1) of the Treaty were not present. Interestingly

[95] *Petrobart Limited v The Kyrgyz Republic,* SCC Case No. 126/2003, Award (29 March 2005).

however, the tribunal's references to the proper timing, when jurisdictional objections must be made, indicates that the tribunal viewed Art. 17 as a jurisdictional defence.[96]

The *Petrobart* case is also notable for the expert opinion of the former Secretary of the ECT Adnan Amkhan, who addressed, *inter alia*, the issue of Art. 17. He opined that a denying state must attempt to take such a step in a timely fashion: that is, either at the time when the investment is made or at the time when a legal action is initiated. Art.17 should be invoked as a defence in a timely fashion is necessitated both by the principles of legal certainty and legitimate expectation.[97]

Nevertheless, *Petrobart* is seldom used as an authority. In *Khan Resources*[98] the Claimants also assert that the decisions in *Petrobart* and *Amto*[99] cannot be cited as evidence of conflicting authority, because in those decisions the tribunal did not rule on the issue.

3.2.2. Plama v Bulgaria

Plama[100] is the first decision under the ECT to address the issue of Art. 17 in detail. The Tribunal expressly noted that the DOB clause in the ECT is different from the ones in modern investment treaties.[101] It is safe to say that *Plama* is the leading case of the ECT line of case law on the DOB clause.

The Tribunal rejected Bulgaria's arguments that Art. 17 is a jurisdictional requirement. It pointed to the specific wording of the provision and its reference to benefits *"of this part* [Part III]", a part which does not include the dispute settlement clause.

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[96] Kaj Hobér, "The Energy Charter Treaty: An Overview" (8 The Journal of World Investment and Trade 8, 3 (2007).
[97] *Adnan Amkhan* (n 92) para 20.
[98] *Khan Resources Inc., Khan Resources B.V, and Cauc Holding Company Ltd. v The Government of Mongolia*, UNCITRAL, PCA Case No. 2011-09, Decision on Jurisdiction (25 July 2012) para 303.
[99] *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award (26 March 2008) para 26(h); *Petrobart* (n 96) paras 345-346.
[100] *Plama* (n 72).
[101] ibid para 149.

The Tribunal was of the view that to the DOB clause could be invoked as a jurisdictional objection, it would mean that the Respondent invoking it would be "the judge in its own cause". That is a license for injustice and it treats a covered investor as if it were not covered under the ECT at all.[102]

When addressing the question whether the denial could have a retrospective effect of the clause, it decided the question in the negative. The Tribunal reasoned that the exercise of the DOB clause by the Respondent should not have a retrospective effect, because it would not be in accordance with the purpose of the ECT – a long-term cooperation in the energy field. It concluded that retrospective application might deny the investor legitimate expectations.[103]

Notable critics of the *Plama* award point out the following flaws in its reasoning:

Douglas argues against the "judge in its own cause" reasoning. He ironically states: "Even if Art. 17 did constitute a potential jurisdictional impediment, which does not, it would not be transformed into a "self-judging" provision unless the principle of *compétence de la compétence* does not apply to arbitrations conducted under the ECT."[104]

As for the exclusive retrospective effect line of reasoning, the Claimant in *Khan Resources* points out that the Tribunal in *Plama* in quoting the ECT's purpose as expressed in its Art. 2, omits the words "*complementarities and mutual benefits*", thus ignoring the "reciprocal elements of the ECT.[105]

Finally, it has been pointed out that the *Plama* interpretation has very impractical consequences, as it imposes on the host state the obligation to review every corporate structure, down to its smallest of subsidiaries and empty mailbox companies that may be contained somewhere within the investors group, of every investment that is made within its territory" if it wishes to exercise its right under Art. 17(1) of the ECT.[106]

[102] *Plama* (n 72) para 149.
[103] ibid. paras 159-165.
[104] *Zachary Douglas* (n 42) 470.
[105] Khan Resources (n 98) para 268.
[106] ibid para 260.

3.2.3. LLC AMTO v Ukraine

This case[107] concerned a dispute between a Latvian investor and Ukraine arising out of bankruptcy of a nuclear power plant in Ukraine. The Respondent raised the DOB clause as a jurisdictional objection, however, the tribunal, satisfied that the substantive requirements for the clauses' invocation were not met, avoided ruling on the issue: "[…] *the Tribunal does not need to determine whether* […] *Respondent can exercise its right to deny advantages at any time, including after the initiation of an arbitration".*[108]

3.2.4. The Yukos set of cases

This well publicised case consists of three parallel arbitrations,[109] the Claimants, three controlling shareholders of OAO Yukos Oil Company (hereinafter Yukos)**,** Hulley Enterprises Limited, a Cypriotic company, Yukos Universal Limited, a company organized under the laws of the Isle of Man, and Veteran Petroleum Limited, another Cypriotic company (hereinafter collectively "the Claimants") initiated arbitrations against the Russian Federation in February 2005. The three arbitrations were heard in parallel.

The Claimants complained that Russia took a series of measures leading to Yukos, in its time one of the world's top oil and gas companies by market capitalization, being declared bankrupt. In its award on jurisdiction and admissibility the tribunal was very clear in adopting the same position as the tribunal in *Plama*.

The tribunal went on to quote again the decision in *Plama* on the issue of the prospective effect of the clause that it would be against the ECT's purpose to accord the clause a retrospective effect.[110] Unlike *Plama*, however, the *Yukos* decisions on

[107] *Amto* (n 95).
[108] ibid para 44.
[109] *Hulley Enterprises* (n 6); *Veteran Petroleum* (n 6); *Yukos* (n 6).
[110] ibid para 458.

jurisdiction do not expressly state that respondents must invoke Art. 17(1) before the relevant investment is made.

Interestingly, professor Crawford, in his expert opinion on the issue of Art. 17 (1), acknowledges the practical difficulty of notifying offshore companies of the exercise of the Art. 17 right but asserts that this is why Art. 17(1) allows states to issue, by clear statement, denials respecting the whole class of investors and potential investors.[111] Crawford thus proposes the idea of an exercise of the denial not to an individual investor, but a kind of *erga omnes* type denial of benefits towards all "mailbox" investors. This idea is further discussed in subchapter 4.2. and chapter 5.

3.2.5. Liman Caspian Oil BV and NCL Dutch Investment BV v Kazakhstan

Claimants in this case[112] brought a claim against Kazakhstan in connection with a license to explore and extract hydrocarbons in the Liman Block in Western Kazakhstan. The Respondent invoked the DOB clause. The Tribunal dealt with the two issues in question in the reverse order. First, it found that the fact that a state must exercise the right to deny benefits to have effect could only lead to the conclusion that the DOB right has a prospective effect. Allowing a retrospective effect would conflict with the object and purpose of the ECT which is "*to promote long-term co-operation in the energy field*" (Art. 2 of the ECT above). Satisfied with ruling out the possibility of the DOB clause having any effect in that case, the Tribunal stopped its analysis there.[113]

However, the Tribunal then rather surprisingly added in the same paragraph:

> *The tribunal also does not have to decide whether in case of a change in the relevant factual circumstances or appearance of new facts, the host state may exceptionally be permitted to retroactively invoke the*

[111] *Hulley Enterprises* (n 6); *Veteran Petroleum* (n 6); *Yukos* (n 6) para 221.
[112] *Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan*, ICSID Case No ARB/07/14, Award (22 June 2010). ICSID Case No. ARB/07/14 (June 22, 2010).
[113] ibid para 227.

right under Article 17(1) of the ECT at the time when it becomes aware of the new situation.[114]

According to some commentators, the Tribunal presents the possibility that a State might successfully invoke Art. 17(1) even after arbitration commences if it can prove its lack of knowledge about the structure of the investor.[115]

3.2.6. Khan Resources Inc. and others v Mongolia

This case is the latest publicly available case involving Art. 17 of the ECT.[116] The jurisdictional decision has been made publicly available very recently and it offers a valuable synthesis of the parties' argumentation in connection to Art. 17 of the ECT. For that reason, this decision will be examined in detail. The summary of the arguments relies partially on the recent analysis by Trevino and Peterson.[117]

The Claimants in this case were a Canadian company and its two affiliates, Khan Resources B.V. (Dutch) and CAUC Holding Company Ltd. (British Virgin Islands), and the Respondents were the government of Mongolia and a state-owned nuclear company MonAtom LLC. The Claimants sought compensation for Mongolia's invalidation of mining and exploration licenses for a local uranium deposit. Apart from a breach of the ECT they also alleged a breach of Mongolia's foreign investment law. The issue of Art. 17 of the ECT will be presented in detail below.

The Respondents argued, as a jurisdictional objection, that the Dutch affiliate, Khan Resources B.V. was a mailbox company owned or controlled by Canadian nationals and having no substantial business activities in the Netherlands. Pointing to Art. 17(1) of the ECT, the Respondents stated that the aim of Art. 17(1) of the Treaty is that ECT

[114] *Liman* (*n* 112*)* para 227.
[115] *Gastrell* (n 10) 89; Patricia Nacimiento, Andrey Panov and Max Stein, 'Energy Charter Treaty Arbitration and the CIS Countries', The European, Middle Eastern and African Arbitration Review 2014 (GAR 2014).
[116] *Khan Resources* (n 98).
[117] Clovis Trevino and Luke Eric Peterson, 'Fortier, Hanotiau and Williams Reject Mongolia's Attempt to Deny ECT Benefits to a Canadian-Controlled Dutch Shell Company', (15 May 2015) IAReporter.

benefits be awarded to "genuine nationals of contracting party states," but denied to investors which have no real connection with a Contracting Party to the ECT, even if *de iure* they are organized within one of those contracting states,[118] the Respondents further argued that a denial of benefits would encompass not only the investment protections found in Part III of the ECT, but also Art. 26, the dispute settlement provision, because that provision is tightly connected with Part III as it "applies only to alleged breaches of Part III of the ECT."[119]

In short, the Claimants' position on this issue was that Art. 26 of the ECT is not situated under Part III of the ECT and therefore falls outside the scope of application of Art. 17(1).

The tribunal agreed with the Claimants. It stated that the ordinary meaning of Art. 17 shows that this provision can operate to deny the Dutch company Claimant the benefit of substantive protections in Part III, but not the benefit of having the dispute decided by arbitration pursuant to Art. 26, which is situated in Part V. The Tribunal concluded that its views on that point agree with those of the tribunals in *Yukos* and *Plama.*[120]

Therefore, the question of denial of the substantive benefits in Part III of the ECT could have been reserved for the merits. The Tribunal, nevertheless, noted that the parties agreed to treat the question as a preliminary one and spent a lot of time arguing it. Thus for reasons of procedural economy the Tribunal decided to deal with the question of Art. 17 of the ECT and its implications in their decision on jurisdiction.[121]

Importantly, the Claimants did not dispute the Respondents' claim that Khan Resources B.V. fulfilled the substantive requirements of Art. 17(1) since it was a legal entity owned or controlled by Canadian nationals and had no substantial business activities in the Netherlands.[122] Therefore the main disputed issue was how and whether Respondents could exercise its right to deny benefits under Art. 17(1) of the ECT.

[118] *Khan Resources* (n 98) para 252.
[119] ibid para 253.
[120] *Khan Resources* (n 98) para 412.
[121] ibid para 213.
[122] ibid para 279.

First, the question of an automatic denial of benefits was raised. The Respondents argued that the ordinary meaning of "reserves the right to" does not suggest that any further action is necessary to exercise the denial of benefits if the Dutch Claimant satisfies the substantive conditions of Art. 17(1).[123]

Second, in the alternative, on the question of temporal limits the Respondents argued that there were no time limits on the Respondents' right to deny benefits even after commencement of arbitration to any entity satisfying the Art.'s substantive requirements. According to the Respondents, a host state might exercise its right when it becomes aware that a "mailbox" company is seeking to claim the benefits of the ECT.[124]

For the Respondents, the interpretation proposed by the Claimants would impose on the state the "impossible task" of examining every corporate structure and monitoring changes in such structure if it wishes to avail itself of its Art. 17(1) right to deny benefits. The Respondents had a difficult task persuading the tribunal that the *Plama* and *Yukos* cases were "wrong" on this issue. Especially since, Mr. Fortier, one of the arbitrators on this case chaired the earlier *Yukos* cases.[125]

The Tribunal noted that the object and purpose of the ECT is to create a legal framework in order "to promote long-term cooperation, based on complementarities and mutual benefits." The tribunal thought that this objective was served best by reading Art. 17(1) as if it leaves a space for states to use or not use the denial of benefits mechanism on an investment-by-investment basis.[126]

The Tribunal, next addressed the question whether this ECT right may be effectively exercised toward a particular retrospectively, that is after the investor commences international arbitration against the host state.

Noting that the text of Art. 17(1) does not answer this question, the tribunal resorted to the "object and purpose" of the ECT "to create a predictable legal framework for investments in the energy field". For the tribunal, the predictability envisioned by the

[123] *Khan Resources* (n 98) para 261.
[124] ibid para268.
[125] *Trevino* (n 117).
[126] ibid (n 117).

ECT is fulfilled "only if investors can know in advance whether they are entitled to the protections of the ECT." If an investor could be denied the benefits of the ECT "at any moment after it has invested in the host country", it would find itself in an unpredictable situation that would "impede the investor's ability to evaluate whether or not to make an investment in any particular state."[127]

The tribunal added that a good faith interpretation of the treaty would not allow a construction of Art.17 that would permit a host state to "lure" investors by ostensibly extending the protections of the ECT to them, but then deny these protections when the investor attempts to invoke arbitration.[128]

For these reasons, the Tribunal held that Art. 17(1) did not operate to bar the Dutch claimant from invoking the Art. 17 of the ECT against Mongolia in this case.

3.2.7. Ascom Group S.A. v Kazakhstan

In this case, [129] the tribunal fully supported the view of the previous ECT tribunals and held that the DOB right is not a jurisdictional matter and may only have a prospective effect: "Art. 17 ECT would only apply if a state invoked that provision to deny benefits to an investor before a dispute arose."

This finding is in conflict with the one in *Plama*. The Tribunal in *Plama* stated that the right must be exercised before the investment is made.

[127] *Trevino* (n 117).
[128] *Khan Resources* (n 98) para 429.
[129] *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Ter.a Raf Trans Traiding Ltd. v Republic of Kazakhstan*, SCC case No. 116/2010, Award (19 December 2013)

4. Government's Guide to Denial of Benefits

This chapter is perhaps unusual for a standard academic research. It aims to show the procedural issues of DOB clauses from the perspective of the right's bearer - the respondent state denying the benefits.

In order to achieve that aim, this chapter assumes a form of a manual that would hypothetically guide the dispute stricken Respondent state in its defence strategy. Admittedly, it largely consists of general observations of the analysis in subchapters 2.4. and 3.2. This chapter is based on the following assumption:

First, generally speaking, the goal of a respondent party to a dispute is to have the claim dismissed preferably in the jurisdictional phase and failing that to have the claim dismissed on the merits and failing that the goal is at least to mitigate damages.

Second, in the hypothetical case, the Respondent must be able, with reasonable expectations of being successful, to argue that the substantive requirements of the DOB clause are met. That means that at least one of the claimants is an entity owned or controlled by a third state and such entity has no substantial business activities in the area of the contracting party, in which it is organized, or any other ground necessary to successfully invoke to clause.

Third, every case is different and there is no general DOB clause. It is therefore extremely difficult to address the issue in abstract. The principles set out below would in reality hinge on the specific factual background of the hypothetical case.

4.1. Know Your Treaty

It is very important for your strategy to analyse the DOB provision in the treaty on the basis of which the claims against you have been issued.

Is the dispute settlement mechanism provision included within the benefits being denied? If the answer is yes, you have a high chance to have the claim against you dismissed on the grounds of lack of jurisdiction. If the answer is no, your treaty is probably the ECT and it may prove difficult to argue that the dispute settlement mechanism is an inherent part of the benefits. However, subject to certain other circumstances, you still can deny benefits at the merits stage.

In any way, some treaties require that you first notify or consult the other party to your treaty.[130] Knowing your treaty means being aware of the procedural requirements for the DOB clause.

4.2. Deny the Benefits As Soon As Possible

The timing of exercise of the right to deny the investor the benefits may under some circumstances prove crucial. If your treaty is not the ECT, you have relatively plenty of time. For example, the Tribunals in *Pac Rim* and *Rurelec* held that the last chance to invoke the DOB clause is in your counter-memorial/statement of defence.[131]

If your treaty is the ECT, on the face of it, there seems to be very little you can do. The exclusively prospective effect of the clause means that unless you invoke you right under Art. 17 or notify the investor before the investment is made, the denial would have no effect. Essentially, there are two possible approaches.

First, a certain hope, in this sense, was brought by the Tribunal in *Liman*. It stated that the host state may exceptionally be permitted to retroactively deny benefits at the time when it becomes aware that the grounds for the denial are satisfied.[132] In other words, you would have to prove the relevant facts, your lack of knowledge and that such knowledge would have caused you to exercise your right to deny benefits.

[130] eg DR-CAFTA (n 32) art 18.3(1) .
[131] Pac Rim (n 57) paras 4.83-4.9; Rurelec (n 68) paras 376–84.
[132] *Liman* (n 111) para 227.

Second, you could try making a general DOB notice as some tribunals and commentators suggested.[133] This would be a denial of benefits not to an individual investor, but to every investor that would make an investment in the future. Make an announcement on your state's official website that you are invoking your right to deny benefits to all the "treaty-shoppers", that is to every investor that fulfils the ground in Art 17(1) of the ECT, and possibly every other investor meeting the 17(2) part. In this way, in could be argued, the requirement of the prospective effect would be met and benefits of Part III of the ECT successfully denied.

However, the second piece of advice comes with a risk of driving back some investors that would otherwise invest in your territory, since you would effectively limit the scope of protection of the treaty for the future.

4.3. Appoint the Right Arbitrator

The *Khan Resources*[134] case demonstrated that it may prove difficult to persuade arbitrators who previously ruled on the same issue that they were wrong. Without naming any names, a few arbitrators and scholars that are often appointed as arbitrators expressed their opinion on the issues discussed and analysed above. There is no doctrine of precedent in the sense of *stare decisis* in ITA and every arbitrator must decide the case only on the basis of the parties' submissions.

Two major pieces of advice would be in place:

If you are facing a claim based on a non-ECT IIA, you would want to appoint an arbitrator that does not see the DOB clauses strictly as an admissibility issue.

Second, if your treaty is the ECT, do appoint the arbitrator that is likely to argue against the accepted *Plama* interpretation of Art. 17.

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[133] *Hulley Enterprises* (n 6); *Veteran Petroleum* (n 6); *Yukos* (n 6) para 221.
[134] *Khan Resources* (n 98). See subchapter 3.2.6.

5. Discussion

Based on the decisions and cases examined above one can make a number of observations. First, as explained in subchapter 2.3. above, Art. 17 of the ECT has a procedural part and a substantive part. Both parts create requirements, which the denying state must meet in order to successfully invoke the clause. Some tribunals usually start with the substantive issues. They first determine whether the substantive grounds for denial of benefits is fulfilled and only if it is fulfilled, then and only then the tribunals address the procedural issues of the DOB clause.

Alternatively, some tribunals first decide on the procedural issues only to subsequently find that the substantive grounds are not fulfilled. The ruling on this issue therefore becomes *obiter dicta*, the value of which is debatable.

Second, when interpreting Art. 17 of the ECT, some tribunals followed the rule of interpretation as set out in Art. 31 and 32 of the VCLT, whereas other tribunals were less observant of the rule, namely the Tribunals in *Plama*[135] and *Yukos*[136] referenced the "shall" language of the ASEAN Framework Agreement on Services as an example of a denial-of-benefits clause that would operate automatically.

It is submitted that when interpreting Art.17, references to other IIAs, instruments such as model BITs or the ASEAN Framework Agreement on Services[137] are not sources of interpretive authority for Art. 17(1) of the ECT under the general rules of interpretation for treaties found at Art. 31 and 32 of the VCLT.

[135] *Plama* (n 72) para 156.
[136] *Hulley Enterprises* (n 6); *Veteran Petroleum* (n 6); *Yukos* (n 6) para 454 156.
[137] ASEAN Framework Agreement on Services (signed 28 January 1992, entered into force 15 December 1995) art VI.

5.1. Art. 17's Exclusively Prospective Effect

When interpreting Art. 17 of the ECT, a reference to other DOB clauses in other treaties should be avoided. Naturally, this follows from the general rule of interpretation pursuant to the VCLT.[138] However, it is submitted that a direct comparison between Art. 17 of the ECT and other DOB clauses outside the area of arbitral interpretation may also prove very difficult since the Art. 17 is simply too distinct a provision.

It can be seen from the examination of the arbitral decisions and cases above that there are two separate worlds of DOB clauses. The world of the ECT and the world of the rest of DOB clauses. Three main issues have been examined in detail: the question of jurisdiction or merits, the question of a possible retrospective effect and the question of the proper timing of the exercise of the right to deny benefits.

As for the first issue, the line between the two worlds seems to be sharp. Whenever the benefits to be denied include the dispute settlement provision, the invocation of the DOB clause is interpreted as defence to jurisdiction. The only exceptions being the opinions *in dicta* of the tribunals in *Petrobart* and *Generation Ukraine*.

As for the retrospective effect, the demarcation is even sharper. The strictly prospective effect of Art. 17 of the ECT is based upon the subject and purpose of the treaty that, unlike any other treaty, stresses the long term cooperation in the energy field. It seems to favour stability and predictability over potential dangers of the practice of "treaty shopping".

As for the issue of the proper timing, tribunals interpreting the ECT did not need to address this issue in order to decide on the concrete matter. The issue has been closely connected to the question of effect of DOB clauses. Given the solely prospective effect of denial of benefits the question of a proper timing depends heavily on the concrete factual background of each case. It is therefore submitted that this question is of a secondary nature.

[138] VCLT (n 12) art 31, 32.

It has been established that Art. 17 of the ECT and the rest of DOB clauses work differently, but what is the root of this difference? In the words of the first research question of this paper, what are the distinguishing features of Art. 17 of the ECT that make it function differently from other DOB clauses?

One special trait of Art. 17 is the inability of the clause to constitute a jurisdictional objection. On its own, it would not make it impossible to invoke the clause, rather, it would merely make it a matter of merits or admissibility. It is submitted that this trait does not make the Art. 17 function differently from other DOB clauses nearly as much as the prospective effect.

The prospective effect of Art. 17 of the ECT stems from the *Plama* line of interpretation. It makes it impossible to exercise the right under Art. 17 of the ECT retrospectively. If one would follow the *Plama* line of interpretation of Art. 17 of the ECT, in order to successfully deny benefits of Part III of the ECT, host states would have to engage in monitoring and screening every investor and investment in the energy sector. If the state found that the investor fulfils the substantive part of Art. 17, for example, it is a mailbox company, the state would notify the investor that it is denied the benefits under the ECT. Only then would the DOB clause be exercised effectively.

Looking at the analysis above, the answer to the first research question must necessarily be the prospective effect, which has been attributed to Art. 17. The long-term character of the ECT creates a strong argument for the correctness of such interpretation.

In conclusion, it is clear that the seemingly diverging treatment of DOB clauses stems from the fundamental difference in the scope of each type of clause. There is no general DOB clause. The scope of the clause is determined by the contextual wording of the clauses and their interpretation in accordance with the object and purpose of their respective treaties. The main distinguishing feature that makes it is practically impossible to successfully exercise the right to deny benefits of the ECT is its prospective effect.

5.2. Article 17 of the ECT Is Not Well Drafted

The title of this subchapter is perhaps hyperbole. However, the fact is that Art.17 of the ECT seems to be practically impossible to invoke. This begs the question why? Is it because arbitral tribunals have interpreted it in the wrong way as some commentators have suggested?[139]

On the contrary, it is submitted that the arbitrators interpreting Art. 17 of the ECT have not interpreted the Art. wrongly. As was established in the subchapter 5.1. above, the main distinguishing feature of the DOB clause in the ECT is its prospective effect.

Indeed, the purpose the ECT is a special treaty focused on the energy sector. That has some important implications. One of these implications is the long-term character of the protected investments and focus on predictability and stability. This is inserted in its Art. 2, which stresses the promotion of *"*long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter."

It is difficult to argue that this interpretation is against the contextual reading of the provision in the light of the ECT's object and purpose.

Turning to the second research question of this paper: Can Art. 17 of the ECT be effectively invoked by respondent states? The short and correct answer would be: it depends. There are countries, such as China, that have very strict screening processes in place. For these states, invoking Art. 17 to the investor before the investment is made means no trouble.

In any way, the answer to the second research question is that the successful invocation is for the vast majority of states very difficult, nearly impossible.

Going back to the beginning of this subchapter, if one assumes that the current line of interpretation of Art. 17 of the ECT is not manifestly wrong, why is it nearly impossible to invoke the clause? Is this really what the parties to the ECT had in mind when they drafted the clause? Answering the latter question in the negative, the only explanation

[139]eg Douglas (n 42) 470, Behlman (n) 422.

that remains is that the Art. 17 of the ECT is not a well drafted clause. Hence the title of this subchapter.

Nevertheless, the author would like to propose a solution. As have already been mentioned above in subchapter 4.2., a possible solution to the problem of the strict prospective effect of Art. 17 of the ECT, is for the states to exercise the right *erga omnes* that is to deny the advantages to a whole class of investors at once by a general declaration.[140]

The counterargument to this idea has been that such a general declaration would necessarily have amounted to a reservation which had been expressly prohibited by Art. 46 of the ECT. The Art. reads as follows: "*No reservations may be made to this Treaty*."[141]

It is submitted, however, that on the contrary, the general prospective declaration of the state would be merely an act of invocation of the state's right which is expressly reserved by Art. 17. For example, a state may decide that it is no longer interested in attracting as many investors as possible including "mailbox" companies. Accordingly, the state would then choose to limit the scope of the ECT's benefits by excluding the "mailbox" companies. Future investors would therefore be advised before making an investment.

In this way, states would achieve the purpose of Art. 17 of the ECT and at the same time meeting the requirement of doing so prospectively.

5.3. Concluding Remarks

This paper has conducted an analysis of procedural aspects of DOB clauses in IIAs. The analysis was focused on the Art. 17 of the ECT.

[140] *Hulley Enterprises* (n 6); *Veteran Petroleum* (n 6); *Yukos* (n 6) para 458.
[141] ECT (n 5) art 46. It is questionable if this could have been meant as a reservation pursuant to art 19 VCLT. See *Khan Resources* (n 98) para 264.

The first chapter outlined the scope of the research that was confided to procedural requirements and issues of DOB clauses. It expressly stated which areas are excluded from the focus of this paper and furthermore addressed the practical difficulties of analysing the ECT without the primary access to the ECT's preparatory works. The author stressed from the beginning the basic principles of treaty interpretation and its application to the DOB clauses. Throughout the paper, the author commented whether tribunals interpreting DOB clauses followed the general rules of interpretation or not. This helped the author to indentify which arguments for various interpretations were stronger and which weaker.

In the second chapter the author tried to provide as broader definition of DOB clause as possible bearing in mind that there is no standard DOB clause. The beginning of the chapter compiled definitions and identification of purposes of DOB clause from various scholars and commentators. The subchapter about the clauses' history helped to highlight the fact that the clauses have been a part of modern international commercial treaties as well as the fact that the DOB type of clause is constantly evolving. The future of DOB clauses was illustrated on the three major multilateral IIAs that are currently under negotiations.

All three CETA, TTIP and TPP will probably include some form of a DOB clause. The negotiated version of CETA and the publicly available draft TPP contained a specific wording of the clause resembling the non-ECT DOB clauses. The author concluded that while the fate of the form of dispute resolution mechanism of these treaties was uncertain, the presence of a DOB clause therein could be safely presumed.

Chapter three analysed the specific case of Art. 17 of the ECT. As had been set out in the introduction of this paper, the preparatory works of the ECT as a primary sources was not available, however, the author managed to found secondary sources either citing the preparatory works or confirming that there is nothing in the negotiating history of the ECT that would suggest that the parties to the ECT intended anything other than what the analyses concluded.

Furthermore, the third chapter went through all the known arbitral awards and decisions addressing the procedural issues of Art. 17 of the ECT. This helped the author to gather the necessary information for the discussion in chapter five.

Unlike the previous studies on this topic, this paper in chapter four used the analysis of the DOB case law to set out a defence strategy for the respondent states.

In answering the research questions, the author confirmed that it was the prospective effect of the Art. 17 that was the main distinguishing feature that had made it practically impossible to successfully exercise the right to deny benefits of the ECT. Due to this interpretation a successful invocation of the clause has been for the vast majority of states very difficult, nearly impossible. The author noted that unless the parties to the ECT specifically intended for the clause to have a prospective effect, the only conclusion must necessarily be that Art. 17 is not a well drafted clause.

Moreover, as a result of a discussion in chapter five, the paper suggested that states deny benefits generally as a "blanket" or *erga omnes* denial to all future investors meeting the substantive requirements of Art. 17(1). In that way, it could be argued, the requirement of the prospective effect would be met. The author would like to express hope that in the future some states will try to exercise their right in Art. 17 of the ECT against all the future "mailbox" investors. Given the established interpretation, it seems to be the only way to make use of the provision.

Naturally, by engaging in a theoretical discussion of yet undiscovered territory of a general, *erga omnes* denial of benefits, there is a risk that the tribunals ruling on the issues will dismiss the author's line of reasoning altogether. However, the author hopes that the suggested solutions how to overcome the procedural issues of Art. 17 of the ECT would at least help provoke the discussion about the issues.

Resumé

Takzvané doložky odepření výhod (denial of benefits, neboli DOB) umožňují, aby stát odepřel výhody mezinárodní investiční smlouvy investorům, pokud se naplní určité předpoklady. Tyto předpoklady nejčastěji zahrnují situace, kdy je investor takzvanou prázdnou schránkou neboli „mailbox“ korporací, jež je sice založena ve státě, který je stranou mezinárodní investiční dohody, ale je vlastněna nebo ovládána osobami třetího nesmluvního státu.

Důvodem vkládání DOB doložek do mezinárodních smluv o ochraně investic je snaha zachovat vzájemnost práv a povinností plynoucích ze smlouvy. Může totiž dojít k nežádoucí situaci, kdy investor nesmluvní strany požívá stejné ochrany jako investor státu, který je stranou smlouvy. Nesmluvní stát tak získává výhodu v podobě ochrany vlastního investora, aniž by sám měl povinnost poskytnout ochranu investorům států smluvních stran na svém území.

Tyto státy lze označit za takzvané „free riders“, tedy za ty, které získávají výhody, aniž by samy za to něco poskytovaly. Z pohledu investorů z třetích států se jedná o praktiku takzvaného „treaty shoppingu“, kdy se korporace snaží nastavit svou vlastnickou strukturu tak, aby získala co nejvýhodnější ochranu poskytovanou právě mezinárodními smlouvami o ochraně investic.

Cílem této diplomové práce je rozbor procesních požadavků DOB doložek v mezinárodních smlouvách o ochraně investic. Analýza se zaměřuje na specifický případ článku 17 Dohody o Energetické Chartě. Součástí této analýzy je rovněž zodpovězení dvou výzkumných otázek:

1) Které rysy článku 17 ECT způsobují, že funguje jinak než ostatní DOB doložky?

2) Pokud vezmeme v úvahu dosavadní rozhodčí nálezy vztahující se k článku 17 ECT, lze vůbec článek 17 Dohody o Energetické Chartě úspěšně uplatnit?

DOB doložky v mezinárodních smlouvách o ochraně investic

Definice DOB doložek

Dolzer a Schreuer definují DOB doložky takto: „*Pomocí této doložky si státy vyhrazují právo odepřít výhody smlouvy subjektu, který nemá obchodní vazbu na ten stát, podle jehož práva je založen. Obchodní vazbu lze spatřovat v kontrole státními příslušníky toho státu nebo v udržování podstatných obchodních aktivit v onom státě*."[142]

Obecně řečeno tyto doložky umožňují, aby stát odepřel výhody mezinárodní investiční smlouvy investorům, pokud se naplní určité předpoklady. Nejčastěji tyto předpoklady zahrnují situace, kdy je investor takzvanou prázdnou schránkou, která je sice založena podle práva státu, který je stranou mezinárodní investiční dohody, ale je vlastněna nebo ovládána osobami třetího státu.

Jak již bylo zmíněno výše, hlavním důvodem vkládání DOB doložek do mezinárodních smluv o ochraně investic je snaha zachovat vzájemnost práv a povinností plynoucích z mezinárodní smlouvy. Může totiž dojít k situaci, kdy investor nesmluvní strany požívá stejné ochrany jako investor státu, který je stranou smlouvy. Nesmluvní stát tak získává výhodu v podobě ochrany vlastního investora, aniž by měl povinnost poskytnout ochranu investorům států smluvních stran na svém území.

Příhodný způsob, jak popsat DOB doložky, je podívat se na jejich alternativy. Co lze použít místo těchto doložek a zároveň dosáhnout stejného výsledku? V případě snahy o zamezení treaty shoppingu lze podobného cíle dosáhnout zúžením definice investora ve smlouvě. Požadavek ekonomického pouta (economic link) ke státu, který je stranou smlouvy, může být vložen jak v DOB doložce, tak může zužovat definici investora, popřípadě investice.

Jako příklad lze uvést následující formulaci definice investora:

[142] Dolzer a Schreuer (n 22).

> [*I*]*investor smluvní strany" znamená: ... právnickou osobu založenou nebo řízenou podle právního řádu smluvní strany a mající podstatné obchodní aktivity na území smluvní strany*.[143]

Tímto způsobem lze sice zamezit praktikám treaty shoppingu, nicméně s takto formulovanou definicí investora mizí možnost volby, kterou umožňují právě DOB doložky. Možnost volby je důležitá, protože státy nemusí mít zájem odepřít výhody každému investorovi, který je prázdnou schránkou.

DOB doložky jsou obsaženy ve velkém počtu mezinárodních smluv o ochraně investic. Jedná se například o ECT, NAFTA [144] DR-CAFTA [145] také o nedávnou přijatou CETA.[146] Je nutné ale zdůraznit, že neexistuje žádná standardní DOB doložka, a jako každé ustanovení v mezinárodních smlouvách je třeba doložky vykládat pomocí obecného pravidla výkladu obsaženého v článcích 31 a 32 Vídeňské úmluvy o smluvním právu z roku 1969.[147]

Jako příklad často používané verze DOB doložek lze uvést doložku v dvoustranné smlouvě o vzájemné ochraně a podpoře investic (BIT) mezi ČR a Kanadou:[148]

Článek XV

Závěrečná ustanovení a vstup v platnost

1. *Smluvní strana může odepřít výhody plynoucí z této dohody investorovi druhé smluvní strany, který je podnikem této smluvní strany, a investicím takového investora, pokud investoři třetího státu vlastní nebo ovládají tento podnik a odpírající smluvní strana přijme nebo bude vůči třetímu státu zachovávat opatření, která zakazují transakce s tímto podnikem nebo která by byla porušena*

[143] *Negotiators Handbook APEC* (n 28) 26.
[144] Severoamerická dohoda o volném obchodu (n 31).
[145] Dominikánsko–středoamerická smlouva o volném obchodu (n 32).
[146] Komplexní hospodářská a obchodní dohoda mezi Kanadou a EU (n 33).
[147] VCLT (n 12) čl 31, 32. Mimo jiné, z tohoto principu vyplývá, že pokud by se mělo mluvit o diskrepanci v rozhodování rozhodčích tribunálů, lze tak činit pouze v případě, že se objeví rozdílné interpretace jedné a téže DOB doložky v jedné a téže mezinárodní smlouvě.
[148] Dohoda mezi Českou republikou a Kanadou o podpoře a ochraně investic (podepsaná dne 6. května 2009) čl XV.

nebo obcházena, pokud by byly výhody plynoucí z této dohody poskytnuty tomuto podnik nebo jeho investicím.

2. *Na základě předchozího oznámení a konzultací podle této dohody může smluvní strana odepřít výhody plynoucí z této dohody investorovi druhé smluvní strany, který je podnikem této smluvní strany a investicím takových investorů, pokud investoři třetího státu vlastní nebo ovládají tento podnik a tento podnik nemá žádné podstatné obchodní aktivity na území strany, podle jejíhož práva byl založen.*

Procesní požadavky DOB doložek

DOB doložky se zpravidla skládají ze dvou částí - z procesní a hmotné části. Procesní část upravuje, jakým způsobem mohou státy své právo plynoucí z doložky uplatnit, čímž klade na stát procesní požadavky. Hmotná část obsahuje výčet skutkových podstat, které musí být naplněny, aby uplatnění práva mělo kýžené účinky odepření výhod.

V souvislosti s procesními požadavky na uplatnění práva odepřít výhody musí rozhodčí tribunály řešit následující otázky:

1) Jde o námitku proti pravomoci (jurisdiction), přípustnosti (admissibility), nebo meritorní obranu?

Odpověď na tuto otázku záleží na výkladu textu jednotlivých DOB doložek. Zpravidla, pokud rozsah výhod, které mohou být odepřeny, obsahuje ustanovení o řešení sporů ze smlouvy o mezinárodní ochraně investic, je použití doložky bráno jako námitka proti pravomoci rozhodčího tribunálu. Možnost řešení sporu v rozhodčím řízení je chápána jako výhoda, která může být odepřena. Pokud je odepřena, rozhodčí tribunál ztrácí pravomoc spor rozhodnout.

Oproti tomu, pokud se ve výčtu výhod ustanovení o řešení sporu rozhodčím tribunálem nevyskytuje, znamená to, že DOB doložkou nelze namítat nedostatek pravomoci. Toto je případ ECT, o kterém bude pojednáno níže.

Podle názoru některých autorů je použití DOB doložky námitkou nepřípustnosti sporu, neboť odpírá veškeré hmotně-právní výhody, a tudíž má za následek zamítnutí žaloby.[149] Rozhodčí tribunál proto sice bude mít pravomoc rozhodnout, ale zamítne žalobu meritorně pro nepřípustnost.

Na totožném principu je postaveno i pojetí DOB doložek jako meritorní obrany. Jde pouze o terminologický problém. Stát využije své právo odmítnout výhody jako obranu ve fázi meritorního rozhodování. Autor této práce vidí rozdíl mezi námitkou nepřípustnosti a meritorní námitkou pouze ve fázi sporu, kdy mohou být vzneseny. Pokud je meritorní námitka vznesena v předběžné fázi řízení, jde o námitku nepřípustnosti.

2) Musí být právo plynoucí z DOB doložky aktivně uplatněno? Pokud ano, jakým způsobem?

Tato otázka rovněž závisí především na výkladu každého jednotlivého ustanovení, nicméně zde panuje shoda, že pokud z textu doložky vyplývá, že uplatnění práva je ponecháno na vůli státu, má se za to, že toto právo musí být aktivně uplatněno. V opačném případě by se jednalo o odepření výhod automaticky, podobně jako u užší definice investora (viz výše).

Způsob, jakým se toto právo uplatňuje, není v textu DOB doložek upraven, a proto přišly rozhodčí tribunály s různými návrhy. Většinou byla navrhována forma veřejného oznámení či oznámení přímo konkrétnímu investorovi.

3) Má výkon práva plynoucího z DOB doložky účinek pouze do budoucna, nebo může působit zpětně?

Za předpokladu, že právo odepřít výhody plynoucí z DOB doložky musí být aktivně uplatněno, vyvstává otázka, jestli působí i vůči investorům, kteří učinili investici před

[149] *Douglas* (n 42) 469.

tím, než stát toto právo uplatnil. Tato otázka je opět věcí výkladu jednotlivých ustanovení mezinárodních smluv, nicméně je možné pozorovat jasný rozdíl v řešení této otázky ve vztahu k ECT oproti ostatním smlouvám o ochraně investic obsahujících DOB doložku (viz níže).

Článek 17 Dohody o Energetické Chartě

Článek 17 ECT dosud nebyl úspěšně uplatněn. Státy používaly toto ustanovení jak v případě námitek nedostatku pravomoci rozhodčích tribunálů, tak jako obranu ve fázi řízení o vlastním sporu. Rozhodčí tribunály interpretovaly článek 17 tak, že je možné jej využít pouze vzhledem k budoucím investicím a investorům, tj. že oprávnění odepřít výhody je účinné pouze do budoucna.

Takovéto čtení článku 17 Dohody o Energetické Chartě by znamenalo, že státy by musely monitorovat zahraniční investory před vznikem sporu, nebo dokonce před tím, než by investoři uskutečnily investici. Vyvstává proto otázka, je vůbec možné v praxi využít právo, které státům poskytuje článek 17, nebo se jedná o „mrtvé ustanovení"?

Článek 17 Dohody o Energetické Chartě zní: (překlad autora)

> ***Článek 17***
>
> ***Neaplikování části III v určitých případech[150]***
>
> *Každá Smluvní Strana si vyhrazuje právo odmítnout výhody této části vůči:*
>
> *(1) podniku, pokud občané či státní příslušníci třetího státu vlastní nebo ovládají tento podnik a pokud tento podnik nemá žádné podstatné obchodní aktivity na území Smluvní Strany, podle jejíhož práva byl založen.*
>
> *(2) investici, pokud odpírající Smluvní Strana prokáže, že tato investice je investicí investora třetího státu, se kterým nebo vůči kterému odpírající Smluvní Strana:*

[150] Bělohlávek (n 19) 128 překládá název článku překvapivě jako „Námitka oponovatelnosti".

(a) neudržuje diplomatické styky; nebo

(b) přijme nebo bude vůči třetímu státu zachovávat:

(i) opatření, která zakazují transakce s tímto podnikem; nebo

(ii) opatření, která by byla porušena nebo obcházena pokud by byly výhody plynoucí z této části poskytnuty tomuto podniku nebo jeho investicím.

Z textu článku vyplývá několik důležitých okolností. Zaprvé formulace „*vyhrazuje právo*“ naznačuje, že správná interpretace článku je ta, která vyžaduje, aby bylo právo uplatněno. Zadruhé odkaz na část III v názvu článku i poté v textu jasně vyjímá z výčtu výhod, které mohou být odepřeny, ostatní části, včetně části V, která obsahuje ustanovení o řešení sporů vyplývajících z ECT. Článek 17 ECT tedy nelze použít jako námitku proti pravomoci tribunálu.

K výše zmíněnému výkladu došel i Tribunál v případu *Plama*.[151] Tento rozhodčí tribunál se dále zabýval otázkou, zda lze právu odepřít výhody přisoudit zpětný účinek, tedy účinek na investice již učiněné. Jelikož text článku 17 tuto otázku neřeší, přistoupil Tribunál k výkladu pomocí předmětu a účelu smlouvy. Tribunál došel k závěru, že vzhledem k tomu, že účelem smlouvy je dlouhodobá spolupráce v oblasti energetiky, nelze investory nejdříve „zlákat“ tím, že v nich stát vzbudí očekávání v podobě výhod, aby je pak odepřel.[152] Článek 17 lze tedy uplatňovat pouze proti budoucím investicím a investorům.

Tento závěr rozhodčího tribunálu byl posléze kritizován především s poukazem na DOB doložky ve smlouvách o ochraně investic odlišných od ECT, kde byly tyto doložky jasně vykládány jako způsob obrany v již započatém sporu, a tudíž je bylo možné uplatnit zpětně na již učiněné investice.[153]

[151] *Plama* (n 72) 149.
[152] ibid. paras 159-165.
[153] *Behlman* (n 14) 399.

Dále byla tomuto výkladu vytýkána jeho nepraktičnost. Způsobuje totiž faktickou nemožnost uplatnění práva odepřít výhody, leda by státy monitorovaly veškeré investory a zkoumaly, zda svou povahou náhodou nesplňují požadavky článku 17 ECT a v případě, že ano, své právo by ihned uplatnily.[154] Možné řešení tohoto problému je nastíněno níže.

Průvodce odepřením výhod

Na základě rozboru rozhodčích nálezů, zabývajících se DOB doložkami, lze formulovat obecné zásady, kterými je třeba se řídit v případě, kdy stát čelící sporu z investiční smlouvy zamýšlí uplatnit své právo z DOB doložky. Následující zásady předpokládají situace, kdy hmotná část dané DOB doložky je splněna a zbývá jen právo z doložky řádně uplatnit. Tyto zásady jsou velmi obecně formulované a slouží pouze jako ilustrace, jak omezené jsou možnosti státu při snaze využít DOB doložku.

Rozhodující je znění DOB

Ze všeho nejdříve státy musí pečlivě vyhodnotit povahu DOB doložky ve smlouvě, za jejíž nedodržení jsou žalovány, neboť jak již bylo řečeno výše, neexistuje žádná standardní DOB doložka. Pro zvolení vhodné strategie při snaze uplatnit právo z DOB doložky je tedy nutné si nejprve ujasnit, jaké jsou procesní požadavky pro jeho uplatnění.

Zahrnuje rozsah výhod, který má být odepřen, i ustanovení o způsobu řešení sporů? Pokud ano, pak je velmi příhodné právo z DOB doložky použít jako námitku proti pravomoci rozhodčího tribunálu. Jinými slovy, je třeba využít možnosti odepřít výhodu nechat spor rozhodnout v mezinárodní arbitráži. Pokud je odpověď záporná, lze namítat nepřípustnost sporu jako předběžnou námitku nebo případně vznést stejnou námitku ve fázi meritorního projednávání sporu.

[154] Khan Resources (n 98) para 260.

Nutnost co nejdříve uplatnit právo z DOB doložky

Správné načasování uplatnění práva odmítnout výhody může mít zásadní vliv na úspěšnost státu jak při uplatnění svého práva z DOB doložky, tak případně na úspěch v celém sporu. Platí zde zásada čím dříve, tím lépe. Jak bylo naznačeno výše, v případě ECT je nutné DOB doložku uplatnit ještě před tím, než investor na území daného státu investuje.

Některé smlouvy o ochraně investic obsahují specifickou povinnost konzultovat uplatnění práva s druhou smluvní stranou nebo investorem druhé smluvní strany.[155] V tomto případě je nutné tak učinit rovněž co nejdříve. V případě námitky pravomoci tribunálu panuje shoda, že je nutné ji nejpozději namítnout v žalobní odpovědi.[156]

Jmenování správného rozhodce

Součástí obranné strategie žalované strany v rozhodčím sporu je výběr vhodného rozhodce. Strany sporu běžně navrhují rozhodce na základě mnoha různých kritérií. Jedním z těchto kritérií může být i názor rozhodce na problematiku DOB doložek. Tyto názory mohou být známé z předchozích rozhodčích nálezů nebo i z akademického působení některých prominentních rozhodců. V případě sporu ohledně uplatnění práva z DOB doložky lze formulovat tyto dvě obecné zásady: Za prvé v případě, že je stát žalován na základě ECT, je lepší zvolit rozhodce, kteří se neztotožňují s výkladem článku 17 v případu *Plama*. Za druhé při sporech na základě jiných mezinárodních smluv by obecným principem bylo navrhnout rozhodce, kteří se nepřiklánějí k názoru, že DOB doložky lze využít výhradě jako námitku nepřípustnosti sporu.

[155] eg DR-CAFTA (n 32) art 18.3(1) .
[156] V případě rozhodčího řízení podle pravidel UCITRAL čl 21, viz Pac Rim (n 57) paras 4.83-4.9; Rurelec (n 68) paras 376–84.

Diskuze a odpověď na výzkumné otázky

Odpověď na první výzkumnou otázku, tj. Které rysy článku 17 Dohody o Energetické chartě způsobují, že funguje jinak než ostatní DOB doložky?, plyne ze skutečnosti, že článek 17 působí výhradně na budoucí investory a investice. Jedná se o hlavní rys tohoto ustanovení, který následně určuje jeho zvláštní povahu a velmi odlišný způsob uplatňování práv v něm obsažených. Díky této vlastnosti je téměř nemožné, nebo přinejmenším velice obtížné pro státy toto ustanovení využít a odepřít daným investorům výhody plynoucí s Dohody o Energetické Chartě.

Ostatní rysy odlišující článek 17 jsou nemožnost jeho využiti jakožto námitky proti pravomoci rozhodčího tribunálu a včasného upozornění investora před jeho uplatněním. Tyto rysy však nejsou primární příčinou zvláštnosti článku 17 ECT.

Nemožnost uplatnit DOB doložku jako námitku proti pravomoci rozhodčího tribunálu má za následek pouze to, že stát bude nucen ji uplatnit později, tedy v meritorní fázi řízení. Tato vlastnost tedy nezbavuje článek 17 jeho využitelnosti v praxi.

Požadavek včasného upozornění investora je až druhotným rysem článku. Nelze ho proto označit jako za rys bezprostředně způsobující nefunkčnost článku 17 ECT. Dodržení včasného upozornění investora přímo závisí na působnosti odepření výhod. Pokud lze výhody odepřít pouze budoucím investorům, je jasné, že včasné upozornění nemůže být učiněno jindy než současně s uplatněním práva z článku 17.

Druhá výzkumná otázka, kterou si tato práce pokládá, tj. Lze vůbec úspěšně právo v článku 17 Dohody o Energetické Chartě uplatnit?, je zodpovězena částečně záporně. Výše zmíněná interpretace přisuzující článku pouze budoucí působnost má za následek, že v praxi nelze bez přísných kontrol a screeeningu všech investorů a investic s předstihem identifikovat potenciální investory, kteří by splňovali podmínky pro odepření výhod podle článku 17.

Určitý způsob, jak překonat svazující požadavek působnosti článku do budoucna by mohl být plošný způsob odepření výhod. To by znamenalo, že by stát prohlásil prostřednictvím příslušných oficiálních komunikačních kanálů, že od určitého data využívá svého práva a odepírá výhody plynoucí z části III ECT všem budoucím

„investorům“ podle čl 1(7) ECT na svém území, kteří zároveň splňují dané požadavky. Takovýto způsob odepření výhod by pravděpodobně vyřešil překážku oné interpretace doložky, že výhody mohou být odepřeny pouze budoucím investorům, nicméně ani tento způsob však není bez problému.

Článek 46 ECT stručně a jasně zakazuje jakékoliv výhrady k této smlouvě.[157] Je tedy možné namítnout, že takto plošné odepření výhod celému spektru investorů by znamenalo trvalé zúžení široké definice investora v ECT a jednalo by se tak o nedovolenou výhradu.[158]

Autor práce je opačného názoru. Za prvé není jasné, z jakého důvodu nazývat plošné odepření výhradou podle článku 17 ECT, především ve světle ustálené definice v článku 2(1)d VCLT. Výhradu je možné učinit pouze při podpisu, ratifikaci, přijetí, schválení smlouvy nebo přístupu k ní. Za druhé odepření výhod podle článku 17 ECT nelze považovat za výhradu podle článku 46 ECT, neboť oba články jsou součástí téže smlouvy a mají stejnou právní sílu. Jakákoliv výjimka by musela být výslovně vyjádřena.

Konečně, rozhodnutí, zda odepřít výhody budoucímu investorovi na svém území, je právo, které je vyhrazeno každému smluvnímu státu podle článku 17. V tomto ohledu není rozdíl, vůči kolika investorům budou výhody odepřeny. Vhodným způsobem zveřejněné plošné odepření výhod by bylo účinným uplatněním práva podle článku 17 ECT.

[157] ECT (n 5) čl 46.
[158] Více viz *Khan Resources* (n 98) para 264.

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Abstract (Czech)

Cílem této diplomové práce je rozbor procesních požadavků DOB doložek v mezinárodních smlouvách o ochraně investic. Analýza se zaměřuje na specifický případ článku 17 Dohody o Energetické Chartě. Součástí této analýzy je rovněž zodpovězení dvou výzkumných otázek:

1) Které rysy článku 17 Dohody o Energetické chartě způsobují, že funguje jinak než ostatní DOB doložky?

2) Pokud vezmeme v úvahu dosavadní rozhodčí nálezy vztahující se k této otázce, lze vůbec článek 17 Dohody o Energetické Chartě úspěšně uplatnit?

Tato práce je rozdělena do pěti kapitol. První kapitola představuje téma DOB doložek jednak obecně a dále se věnuje i specifickému případu článku 17 Dohody o Energetické Chartě. Druhá kapitola je teoretická a věnuje se tématu DOB doložek komplexně. Začíná definicí a významem doložky a poté uvádí příklady různých doktrinálních přístupů. Dále tato kapitola mapuje historii, současnost a budoucnost DOB doložek. Třetí kapitola se zaměřuje již výhradně na specifický případ DOB doložky, článek 17 Dohody o Energetické Chartě. Stejně jako v předchozí kapitole jsou rozebrány případy a rozhodnutí rozhodčích tribunálů, které se dotýkají právě dané problematiky. Čtvrtá kapitola nazvaná „Government's Guide to DOB", poskytuje pohled na problematiku z pohledu státu, který hodlá využít svého práva z DOB doložky. Závěrečná pátá kapitola shrnuje poznatky předchozích kapitol a nabízí odpovědi na výše položené výzkumné otázky. Následně autor navrhuje řešení, jak se vypořádat s problematikou relativní obtížnosti využití práva plynoucího z článku 17 Dohody o Energetické Chartě.

Odpověď na první výzkumnou otázku vymezuje fakt, že článek 17 působí výhradně na budoucí investory a investice. Jedná se o hlavní rys tohoto ustanovení, který následně určuje jeho zvláštní povahu a velmi odlišný způsob uplatňování práv v něm obsažených. Díky této vlastnosti je téměř nemožné, nebo přinejmenším velice obtížné pro státy tohoto ustanovení využít a odepřít daným investorům výhody plynoucí s Dohody o Energetické Chartě.

Druhá výzkumná otázka, kterou si tato práce pokládá, tj. Lze vůbec úspěšně právo v článku 17 Dohody o Energetické Chartě uplatnit?, je zodpovězena částečně záporně. Výše zmíněná interpretace přisuzující článku pouze budoucí působnost má za následek, že v praxi nelze bez přísných kontrol a screeeningu všech investorů a investic s předstihem identifikovat potenciální investory, kteří by splňovali podmínky pro odepření výhod podle článku 17.

Závěrem autor navrhuje způsob odepření výhod podle článku 17 Dohody o Energetické Chartě, který by mohl být v souladu s požadavkem působnosti článku do budoucna. Jedná se o odepření výhod plošně, to znamená vůči všem budoucím investorům a investicím, které by splňovaly dané podmínky.

Abstract (English)

The so called “Denial of Benefits” clause (DOB) gives the respondent state an opportunity to exclude third parties to the investment protection treaties from enjoying the benefits of the treaty without assuming reciprocal obligations.

No less than seventy-three investor-state disputes have been brought to arbitration under the ECT since its entry into force back in 1998. The DOB clause in ECT, Art. 17 has never been successfully invoked. States have tried to exercise their right in at least ten cases without success.

This paper poses two research questions. First, what are the distinguishing features of Art. 17 of the ECT that make it function differently from other DOB clauses? Second, given the arbitral decisions, can the Art. 17 of the ECT be effectively invoked by respondent states?

The paper is divided into five chapters. The first chapter introduces the topic of DOB clauses and the purpose of this paper. The second chapter is theoretical and addresses the topic of DOB clauses in general and further outlines their past, present and future. The third chapter focuses specifically on the Art. 17 of the ECT it examines the ECT arbitral awards and decisions that touched upon the clause. Chapter four aims to show the procedural issues of DOB clauses from the perspective of respondent states, it assumes a form of a manual suggesting basic principle states should follow. The paper is concluded by a discussion in chapter five, where the author proposes a possible solution to the problem with invoking of the clause.

In answering the research questions, the author notes that the main distinguishing feature that makes it practically impossible to successfully exercise the right to deny benefits of the ECT is its prospective effect. Due to this interpretation a successful invocation of the clause is for the vast majority of states very difficult, nearly impossible. In conclusion, the author entertains a hypothesis that At. 17 of the ECT is not well drafted.

Based on the analysed data, the paper suggests a possible solution to this problem. A state could deny the benefits of the ECT to a whole class of investors at once by a general declaration aimed *erga omnes*.

Key Words

denial of benefits clause, Energy Charter Treaty, Art. 17 of the ECT, Investment Treaty Arbitration, ISDS

Klíčová slova

doložka odepření výhod, Dohoda o Energetické Chartě, článek 17 Dohody o Energetické Chartě, mezinárodní investiční arbitráž, spory investor-stát